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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

THOMAS GUSICK, JR.,
A minor, by his next friend and father,
THOMAS GUSICK,
Petitioner,

v.

DONALD L. DRIESUS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming, with one Judge dissenting, a decision of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing petitioner's Complaint.

CITATION TO OPINION BELOW.

The opinion of the United States Court of Appeals is as yet unreported. It is set forth in the Appendix, *infra*, at pp. 47-61. The opinion of the District Court is reported at 305 F.Supp. 472 (N.D. Ohio 1969) and is reprinted in Appendix, *infra*, at pp. 23-46.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on September 16, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the First Amendment allows the suspension of a high school student for simply wearing an inoffensive peace button whose message was specifically found to be unlikely to inflame other students.

2. Whether public high school officials can effect a blanket prohibition on *all* speech, protected and unprotected alike, in an alleged effort to prevent arguably unprotected speech or conduct completely divorced from the speech for which petitioner was suspended.

3. Whether the record supports the kind of findings required by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) as a precondition to inhibiting the exercise of First Amendment rights by public school students.

4. Whether school officials deny students the equal protection of the law by invoking racial tensions at the school as a basis for prohibiting students from wearing expressive buttons having nothing to do with race which buttons other students in the area are allowed to wear.

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States.

First Amendment.

Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment.

* * * * *

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

STATEMENT OF THE CASE.

On February 24, 1969, this Court announced its decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503. Petitioner, an 11th grade student at Shaw High School, a public high school in East Cleveland, Ohio, read a newspaper account of the *Tinker* decision. On March 10, 1969, he reported to school wearing an anti-war button on which appeared the following inscription:

April 5 Chicago
GI-Civilian
Anti-War
Demonstration
Student Mobilization Committee

(Plaintiff's Exhibit 1.) [1]

The school day passed uneventfully. At its conclusion two students noticed petitioner's button and asked what it said. Petitioner's explanation prompted only a casual reaction (292a; R. 380). There was absolutely no disruption of the educational process and no interference with the classroom routine at Shaw High School as a result of petitioner's wearing his button on March 10 (292a; R. 380).

The following day, March 11, 1969, petitioner returned to school, wearing the same button (147a; R. 134). By prearranged plan, he and a ninth grade friend, Hunter Havens, went to the office of Principal Drebus to inquire about the propriety of distributing leaflets in school. The

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[1] The language on the button referred to a march planned for April 5, 1969, in Chicago, as a demonstration against the war in Vietnam. A permit for the march had been obtained from the City of Chicago and the march was to be entirely peaceful and legal with confrontations of any kind to be avoided. Off-duty servicemen were being urged to participate, their right to do so having been established by army regulations (553a; R. 781; Plaintiff's Exhibit 18).

visit occurred subsequent to homeroom period but prior to first period. Drebus advised the boys that they could not distribute leaflets and warned them if they did they would be suspended (147a; R. 134). During this conversation, Principal Drebus noticed that petitioner and Havens were wearing the peace button described above. He ordered the buttons removed (148a; R. 135). Havens complied but petitioner refused. He said that he had heard about a Supreme Court decision which he felt assured his right to wear the button (296a; R. 385). According to petitioner's testimony, corroborated by Havens, Drebus said that Supreme Court rulings do not apply to Shaw High School (148a, 296a; R. 135, 385). Drebus contends that he told the boys he was "seeking legal counsel" and that in the meanwhile Shaw's rule barring buttons and insignia was in effect and would be enforced (517a-518a; R. 717-718). What occurred next is not in dispute: Drebus suspended petitioner from school (519a; R. 719).

Shortly after his suspension, petitioner, by his father, filed this action in the United States District Court. The Court's jurisdiction was invoked under 28 U.S.C. section 1343 and 42 U.S.C. section 1983. Petitioner asked to be reinstated in school with his right to wear the button protected; for a declaratory judgment voiding any Board of Education rule or regulation proscribing or abridging his right to wear the button; for appropriate injunctive relief; and for damages.

At the trial, the evidence portrayed the following:

First, it was uncontradicted that petitioner's wearing of his button on March 10 describing the time and place of an anti-war rally in Chicago caused no disruption of the educational process at Shaw High School. His speech was unaccompanied by any conduct of an offensive or intrusive nature such as urging other students to wear a button

(97a-98a, 292a; R. 64-65, 380). Nor did the school officials make a showing of a reasonable basis to believe that the wearing of this button would substantially interfere with schoolwork or infringe on the rights of other students. The respondents offered no evidence that petitioner's button might be inflammatory or provocative except perhaps "to some students" (364a; R. 482) or to students who might have relatives in Vietnam (380a; R. 512).[2] It is not surprising therefore that the District Court concluded that:

> The button at issue in the instant case did not convey an inflammatory message. It does, however, portray the position of the wearer with respect to a political issue. Although there was evidence that the message conveyed in this particular button might be such as to inflame some of the students at Shaw High, the Court does not feel that such a result is likely. App., *infra*, p. 37, 305 F. Supp. at 479.

Indeed, respondents did not seek to justify petitioner's suspension on the premise that his message did cause or would have caused a disturbance. Instead, the proffered rationale for prohibiting petitioner's button was simply fear of the consequences of permitting the wearing of *other* buttons with *other* kinds of messages (360a, 364a, 380a, 385a, 434a; R. 477, 482, 512, 520, 588). Disclaiming an ability to draft or implement a rule which would only

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[2] Respondent Leslie Reardon, a member of the School Board, predicted trouble if petitioner were permitted to wear his button:

> [T]here are a number of students who have relatives in Vietnam and, frankly, if we had had, in my opinion, if we had had actual declaration of the war, this would be almost treason, but inasmuch as it is a police action, why, it is different, but nevertheless those that do have close relatives in the war feel very keenly about people that are talking about peace movements and bringing the men back without realizing what the whole story is. (380a; R. 512)

interdict expression or speech that was obscene or racially inflammatory or directly inciting to imminent violence or unlawful conduct, the school officials instead contended that their only alternative was to prohibit the wearing of all buttons.

To buttress this theory, the respondents asserted that the rule against wearing buttons or other means of identification with a particular point of view, except those buttons approved by respondents which were directly related to in-school activities (56a; R. 23), was both long-standing and universally applicable (App., *infra*, p. 49). The rule was supposedly adopted in the 1940's to discourage fraternities and gangs (399a; R. 539). Yet there are still "gangs" at the school wearing jackets with identifying insignia (291a; R. 377). In addition, students are also permitted to wear any buttons, *even those dealing with controversial subjects*, at high school athletic events which occur at night (73a; R. 40). Indeed Mr. Drebus stated that petitioner could have worn his peace button at a night basketball game (73a; R. 40). Finally, one eleventh-grader wore a "Nixon" button to school on two separate occasions shortly before the 1968 elections, and no one instructed him to remove it.

The students who testified at the trial said they had never heard of the rule. The youthful supporter of President Nixon was unaware that his button violated any school rule (128a-130a; R. 104-106). Neither the president of the Board of Education nor Mr. Drebus knew whether the rule had ever been publicly announced (369a; R. 489; 51a; R. 18). No mention of such a rule is made in written regulations promulgated among the students, nor was the rule ever announced over the public address system (Plaintiff's Exhibit 2; 49a; R. 16). Apparently the rule is not specified because the school officials claim they

prefer "leeway" in its enforcement (419a-420a; R. 563-64).

But even alleged age and alleged even-handed application cannot, by themselves, justify a rule infringing First Amendment rights. To save the no-button prohibition, therefore, respondents argued as follows: Shaw High School has a student population which is seventy percent black and thirty percent white (535a; R. 744). The school experiences substantial racial tensions (360a; R. 477). If school officials allowed petitioner to wear his peace button [which the Court found had no potential for exacerbating racial tensions (351a; R. 467)] they would have to allow the wearing of other buttons which might be racially inflammatory and which could cause disruption.

Respondents were hard-pressed to demonstrate the likelihood that their fears would be realized. Shaw students are free to wear controversial buttons at athletic events, yet none of the respondents was aware of a single incident of violence or disruption at such events having anything to do with the wearing of a button (342a, 373a, 386a, 442a, 470a-471a; R. 458, 502, 521, 597, 638-39). Apparently the students chose not to wear "provocative" buttons offensive to other students (474a; R. 643). Even if "provocative" buttons are worn in school respondents acknowledged they have ways of controlling the situation (453a-454a; R. 615-616).

The District Court's findings of fact speak of three episodes in support of its conclusion that "the wearing of buttons and other emblems and insignia has occasioned substantial disruptive conduct in the past at Shaw High." The first of these occurred *decades ago* when gang insignia occasionally provoked fights (398a-399a; R. 538-39). The second, a more recent incident, involved certain students trying to force scarves on other students. This, however,

did not take place at Shaw but at a nearby junior high school (401a; R. 541). The final episode involved a white Shaw student who wore a button with the inscription "Happy Easter, Dr. King," referring to the assassination of Dr. Martin Luther King. A fight occurred in the cafeteria, not an unusual occurrence, but there was no evidence that the button caused the fight (437a; R. 591) or that the incident disrupted the school's educational routine. And petitioner was not involved in any way in any of the incidents cited by the court. Further, Principal Drebus and his top assistant disclaimed knowledge of any experience at Shaw of commotion or disturbance as a result of the wearing of any button (540a-541a; R. 749-750; 451a; R. 613). In fact, on numerous occasions radical groups have openly circulated far more volatile political messages on the Shaw campus (290a; R. 376; Defendants' Exhibits B, R, T and V) without noticeably provoking disturbance.

In light of this background, the respondents' meagre showing scarcely justifies an anticipation of disruption from the wearing of buttons.

The respondents' unfounded predictions of disruption are further undermined by the experiences of other high schools in the area. Shaw High is apparently the only school in the Cleveland area, many of which are racially mixed, which purportedly has a no-button rule. There was extensive testimony that students throughout the area have worn buttons expressing their views on matters of race, politics, and the Vietnam War *without incident*. Many of these students wore the identical button for which petitioner was suspended without challenge by any school official. The experiences in all the other schools in the area have proven the respondents' prognostications of disruption to be baseless. One suspects that the Shaw "rule" is

no more than a retrospective justification for petitioner's unconstitutional suspension.

Despite the District Court's finding that no disruption would be occasioned by petitioner's button, it upheld the no-button rule and dismissed the complaint. With one Judge dissenting, the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT.

The petition for certiorari should be granted because the decision below is not only in direct conflict with this Court's opinion in *Tinker*, but also with a host of other opinions which have explicated First Amendment freedom. In addition, this case affords the opportunity to resolve the conflicts and alleviate the confusion among the lower federal courts concerning the First Amendment rights of public school students.

1. The decision below directly conflicts with this Court's Decision in Tinker v. Des Moines Independent Community School District.

If the petitioner had been wearing a black armband instead of a peace button, the facts of this case would be identical to the facts in *Tinker*, and there can be no constitutionally significant, let alone logical, distinction between the two cases. Wearing a peace button, like wearing a black armband is "the type of symbolic act that is within the Free Speech Clause of the First Amendment." *Tinker v. Des Moines Independent Community School District*, *supra* at 505. It is "akin to 'pure speech'." *Id.* at 508. Indeed, because the button which caused petitioner's suspension directly communicated information, it is perhaps even closer to "pure speech." In his dissent, senior circuit judge McAllister is succinct and to the point:

McALLISTER, Senior Circuit Judge, dissenting. When a few students noticed the button which appellant was wearing, and asked him "what it said," appellant's explanation resulted only in a casual reaction; and there was no indication that the wearing of the button would disrupt the work and discipline of the school.

I am of the opinion that the judgment of the district court should be reversed and the case dismissed upon the authority of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

The District Court specifically found that the message itself did not cause disruption, nor was it likely to do so. In addition, here, as in *Tinker*, the wearing of the button "was entirely divorced from actually or potentially disruptive conduct by those participating in it." 393 U.S. at 505. Petitioner simply wore his button. There was no attempt to harass other students. Compare *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). In short, neither the message nor the bearer was disruptive.

Based on these undisputed facts, the rule of *Tinker* should have applied to petitioner. The heart of this Court's decision is that the First Amendment will not permit school officials to punish students "for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [those students]." 393 U.S. at 508. There is room for state regulation only where the conduct of the students seeking to exercise their First Amendment rights "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'." 393 U.S. at 509, quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966).

Finally, in *Tinker*, as here, the school officials expressed generalized fear that trouble might erupt if high

school students were permitted to express their views on subjects such as the war in Vietnam. This Court's response was as compelling there as it is here:

> * * * But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. 393 U.S. at 508-09.

In every respect the *Tinker* holding should have been dispositive of the issues here. That it was not is attributable to the distinctions, some irrelevant, others constitutionally improper, seized upon by the court below.

The court below read *Tinker* as though it were exclusively an equal protection decision. A proscription on protected expression is no more tolerable because it is even-handed. "The Equal Protection Clause requires more of a state than non-discriminatory application within the class it establishes." *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966).

Of course, the primary purported distinction between this case and *Tinker* was the racial composition of Shaw High School. The courts below accepted respondents' theory that in a racially integrated high school the only way to avoid speech which assertedly might lead to racial

disturbance is to prohibit all speech outright. Such a rule of law, prohibiting in an integrated school the same expression that would be allowed in an all-white school, cannot be implied from *Tinker* and is constitutionally improper:

> For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered. *NAACP v. Button*, 371 U.S. 415; 444-445 (1963).

Perhaps dissatisfied with the efforts to distinguish *Tinker*, the court below concluded by reverting to an analysis of petitioner's button itself. Comparing petitioner's button with those worn in *Burnside* and *Blackwell*, the court described it as "supportive of a divisive demonstration * * * [and] more provocative than the *Blackwell* button's reach for friendship." (App., *infra*, p. 58). Students should not be allowed, the court ruled,

> [to] come to school wearing the badges of their respective disagreements, and provoke confrontations with their fellows and their teachers. The buttons are claimed to be a form of free speech. Unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such right. (App., *infra*, p. 60).

Petitioner submits that such an analysis does not distinguish *Tinker*; it repudiates it.

2. The high school's "no button" rule is void for overbreadth affording this Court the opportunity to apply that traditional First Amendment doctrine to the public school situation.

Throughout this litigation there has been little doubt that petitioner's expression was constitutionally protected. Here, as in *Tinker*, there was "no evidence whatever of *petitioners'* interference, actual or nascent, with the rights of other students to be secure and to be let alone." 393 U.S. at 508 (emphasis added).

Yet, the no-button rule and petitioner's suspension have been justified on the sole ground that if he is permitted to wear his button, other students must be allowed to wear buttons, some would wear racially offensive buttons and disturbances would result. Assuming *arguendo* that the factual and legal premises are correct, i.e., that students would wear racially offensive buttons which a school could constitutionally prohibit, that does not justify prohibiting petitioner's protected expression. *Petitioner's rights cannot be denied because others may abuse theirs.*

It is axiomatic that the state may not seek to regulate First Amendment rights by rules which "sweep overbroadly," simultaneously prohibiting activities which can be proscribed and those which cannot. *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966); *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). A corollary to this is the principle that where the state has a compelling interest in regulating speech, such as preventing disruption in schools, it may not pursue even such legitimate goals "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Elfbrandt v. Russell, supra* at 18. This require-

ment of seeking less drastic alternatives, *see Shelton v. Tucker, supra*, requires precision of regulation. The prohibition must be aimed solely at that which can be legitimately prohibited.

These First Amendment guidelines have frequently been applied in the college context. Recently, for example, a federal court in West Virginia invalidated statewide college regulations which required, upon threat of suspension, that demonstrators disband on order and which prohibited *all* indoor gatherings. *Sword v. Fox*, ____ F. Supp. ____, 39 Law Week 2225 (D.C. W.Va. 10/2/70). Several students were penalized for clearly protected assembly. While noting the state's authority to regulate demonstrations, rallies and marches, the court held that "insofar as the State seeks to regulate such activities it must not act in such a sweeping manner as needlessly stifles expression * * *" 39 Law Week at 2225. Similarly, a three-judge court in Texas invoked the overbroad principle to void a state university regulation analytically identical to Shaw's no-button rule. There the rule prohibited all commercial or non-commercial solicitation, with exceptions for "authorized" activities. The rule was applied against dissident groups on campus. The court held the regulations to be unconstitutionally overbroad:

> Thus, while the Regents can certainly prohibit disruptive or fraudulent solicitation, they must do so in a manner that strikes at the very evil they wish to prevent. Applying this principle to the case at hand, we find that the Regents' solicitation rules at issue are unconstitutionally overbroad.
>
> The severe limitation the rules place on solicitation generally are unreasonably restrictive of the clearly protected activities engaged in by the plaintiffs in this case. Thus by broadly limiting all solicitation in the two rules, the Regents have simply failed

> to speak with that small calibre precision required of regulations touching first amendment rights.
>
> This holding in no way impairs the right of the Regents to prohibit activity disruptive of the educational processes on campus. *New Left Education Project, et al., v. Board of Regents of the University of Texas System*, ____ F. Supp. ____

The same analysis was followed by the Seventh Circuit in *Soglin v. Kauffman*, 418 F.2d 163 (1969) to invalidate university disciplinary rules. But see, *Esteban v. Central Missouri State College*, 290 F. Supp. 622, 630 (W. D. Mo. 1968); *aff'd*, 415 F.2d 1077 (8th Cir. 1969).

Petitioner submits that the extent to which First Amendment doctrine such as overbreadth are applicable in the high school setting is a substantial question which this Court should resolve.

Respondents here claim an inability to draw regulations precisely aimed only at disruptive conduct, whether sparked by racially offensive buttons or otherwise. But school officials in other parts of the nation, including urban areas where schools are plagued by racial discord, have drafted rules which permit students to exercise First Amendment rights subject only to a bar on specified materials deemed offensive. For example, the New York City Board of Education permits students to wear buttons and distribute leaflets under the following limitations:

> No commercial or obscene material, nothing of a libelous nature or involving the defamation of character nor anything advocating racial or religious prejudice will be permitted to be distributed within the school. In noting these exceptions it is clearly the intention of the Board of Education to promote the dissemination of diverse viewpoints and to foster discussion of all political and social issues. Board of

Education's Amended Resolution on "Rights and Responsibilities of Senior High School Students," *New York Times* July 8, 1970, p. 16.

Similarly, the State Education Commissioner of New Jersey, while ruling that school officials could ban the distribution of hate literature, pornography and irresponsible publications "aimed at creating hostility and violence," rejected as "an encroachment upon freedom of expression" a regulation barring *all* distributions on campus. *Trenton Times*, City Final Edition, June 24, 1969, p. 9.

Carefully defined regulations such as these, while not necessarily constitutionally perfect, demonstrate that school officials willing to take the time and trouble can attempt to draw lines. This Court hardly needs reminding that the task of determining what is to be excluded from First Amendment protection is a complicated one. *E.g.*, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966). But it is a responsibility that public school officials must try to meet. Suppression of all speech is the easy but counter-productive response to the turbulence in our public schools. Indeed, the solution can more likely be found in allowing freedom of expression, not suppressing it. See *Whitney v. California*, 274 U.S. 357, 375-377 (1927) (concurring opinion of Justice Brandeis).

3. This Court should resolve the question whether the possibility of disruptive conduct by others is sufficient to justify the infringement of First Amendment rights of a non-disruptive high school student.

It has long been the rule that speech cannot be curtailed because of hostility by the audience against the speaker. See *Terminiello v. Chicago*, 337 U.S. 1 (1949);

but see, Feiner v. New York, 340 U.S. 315 (1951). Particularly when speech is addressed to racial issues, the hostile audience cannot be granted a veto power over First Amendment rights. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Gregory v. Chicago*, 394 U.S. 111 (1969). This Court has held both in school and non-school situations that the possibility of racial conflict will not defeat or forestall the enjoyment of constitutional rights. See *Cooper v. Aaron*, 359 U.S. 1 (1958); *Watson v. Memphis*, 373 U.S. 526 (1963).

In *Tinker* this Court noted the possibility of hostile audience reaction, 393 U.S. at 508-09, but ruled in favor of what it described as "hazardous freedom." In the instant case there was no evidence of any hostile reaction to petitioner; yet the courts below found a legitimate state interest in protecting against the possibility of a hostile audience based upon the courts' speculation that other students would wear inflammatory buttons.

In *Crews v. Clones*, F.2d (7th Cir. No. 18110, 8/10/70), it was held that the non-disruptive student cannot be punished for the disruptive acts of other students who react to his conduct. The case involved a high school student who had long hair. The school authorities cited specific instances of disruption flowing from the plaintiff's locks. The Seventh Circuit squarely faced the issue of "whether and to what extent disruptive conduct of others in response to plaintiff's long hair, can be used to justify plaintiff's expulsion from school." Slip opinion at 8. The court held that the hostile audience could not exercise that type of veto over one student's expression:

> We agree with the sentiments voiced by Professor Chafee when he observed that it is absurd to punish a person "because his neighbors have no self-control and cannot refrain from violence." Z. Chafee, *Free*

> *Speech in the United States*, 151-52 (1941). This principle is generally applicable to prohibit the imposition of state sanctions on a speaker when his speech causes disruption or violence by a hostile crowd, *Terminiello v. Chicago*, 337 U.S. 1 (1949); *cf. Gregory v. Chicago*, 394 U.S. 111 (1969). Because of its relation to the achievement of education goals, the state interest in maintaining order may be greater in the school context than in society in general. Nevertheless, the Supreme Court has indicated that the principles announced in *Terminiello* are not without application when the free speech of students is threatened. *Tinker v. Des Moines Independent Community School District, supra* at 508. We think a similar principle operates to protect long-haired students unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct. ____ F.2d ____.

If *actual disruption* by others cannot justify the suppression of rights of the orderly high school student, the *possibility of disruption* hardly suffices to sustain such suppression. The decision by the courts below conflicts with the Seventh Circuit's holding in *Crews* and the difference should be resolved by this Court.

4. This Court should grant review to elaborate the substantial disruption standard to aid the lower federal courts in applying Tinker.

Both sides in this case agree that Shaw High School was a scene of some racial tension. In dispute was whether the record supported a finding that substantial disruption and interference with the educational process had resulted from the wearing of buttons in the past; and whether substantial disruption and interference with the educational process would result from allowing the students to wear

political or racial buttons and insignia, or indeed whether students would wear such buttons. Despite the fact that the respondents' showing was meagre, consisting primarily of a few isolated episodes having nothing to do with petitioner and relying mostly on predictions of disturbance, both courts concluded that there was a sufficient factual basis to anticipate "substantial disruption," App., *infra*, pp. 36, 56. Accordingly, petitioner was denied the protection of *Tinker*.

This case is symptomatic of the way in which a limited factual basis can be elevated into a showing of substantial disruption, thus frustrating this Court's mandate in *Tinker*. The prime example of nullifying *Tinker* by unsupported findings of disturbance is *Butts v. Dallas Independent School District*, 306 F. Supp. 488 (N.D. Tex. 1969) denying the right of school students to wear black armbands on Vietnam Moratorium Day. By contrast the proper interpretation of *Tinker* is seen in *Aguirre v. Tahoka Independent School District*, 311 F. Supp. 664 (N.D. Tex. 1970). There, Mexican students wore brown armbands to protest their discrimination. The court found that "only isolated incidents of unrest or apprehension were attributable to the wearing of the brown armbands" and did not constitute a

> showing that the wearing of the armbands by plaintiffs and the class they represent would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal educational functions. 311 F. Supp. at 666.

The *Aguirre* approach to *Tinker* is the sound one as distinguished from the holding below. This Court should grant review to so rule.

5. Shaw's no-button rule denied petitioner and the other Shaw students the equal protection of the law.*

High school students throughout the country and, more importantly, throughout the Cleveland area enjoy the right to wear political buttons. In an age where buttons are an all important source of expression for young people, the denial is serious. It is not a small, relatively non-oppressive, disciplinary rule as the Court of Appeals characterized it, App., *infra*, p. 53. During a political campaign, students all over Cleveland wear buttons bearing the names of candidates they support. Shaw students alone are denied this right.

Shaw's rule is clearly violative of equal protection of law. It is premised on racial factors and tensions not constitutionally allowable as grounds for restricting First Amendment rights. See *Edwards v. South Carolina, supra*. Since other schools in the Cleveland area, with mixed racial patterns, permit the wearing of buttons, the classification is arbitrary and without a reasonable basis.

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* The Sixth Circuit refused to rule on this point on the ground that it had not been argued to the court, App., *infra*, p. 61. The court is mistaken. The equal protection argument occupied pp. 52-60 of the appellant's brief and pp. 16-18 of the reply brief.

CONCLUSION.

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION AND ORDER OF THE DISTRICT COURT.

Case No. 69-209.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

THOMAS GUZICK, JR.,
A minor, by his next friend and father,
THOMAS GUSICK,
Plaintiff,

vs.

DONALD L. DREBUS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER.

(As Amended May 6, 1969.)

This is an action arising under the provisions of Title 42, U.S.C.A., S1983. This section provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint, in summary, alleges the following: Thomas Guzick, Jr., is 17 years of age and is a student at Shaw High School in East Cleveland, Ohio. Defendant, Donald L. Drebus, is the principal of Shaw High School.

The other defendants are: Nelson F. Leist, Superintendent of the East Cleveland School District; and Robert Henderson, Charles Hamilton, Leslie Reardon, Erwin Schrader, and George Beasley, who are members of the East Cleveland Board of Education. Plaintiff desires to wear a button on his lapel while attending school at Shaw High. The button reads:

"April 5 Chicago
G.I. Civilian
Anti-War
Demonstration
Student Mobilization Committee"

He wore this button to school on March 11, 1969. The school principal, Mr. Drebus, ordered the plaintiff to remove the button. Upon the plaintiff's refusal to remove the button, Mr. Drebus suspended him from Shaw High School until such time as he returned to school without the button. The complaint alleges that the acts of Mr. Drebus in suspending the plaintiff have been ratified, approved, or encouraged by the other defendants in their official capacities. Plaintiff alleges that his right to wear this button is protected by the First Amendment to the Constitution, and that his suspension deprives him of rights guaranteed by the Constitution; and, further, that his suspension was without just cause, without a hearing, and without due process of law. The complaint alleges that similar buttons are being worn in other high schools in the Cleveland area, and that the acts of the defendants denying the plaintiff his right to wear a similar button deprives him of the equal protection of the law as guaranteed by the Fourteenth Amendment. The complaint seeks a temporary restraining order enjoining the defendants from interfering with the plaintiff's right to wear the button while attending school and from refusing to rein-

state the plaintiff. It also seeks a preliminary and permanent injunction directed toward securing the same relief. The complaint further seeks a declaratory judgment that any rule or regulation of the East Cleveland Board of Education proscribing the wearing of such buttons is unconstitutional, and the complaint further seeks damages in the amount of One Thousand ($1000.00) per day for every day the plaintiff is compelled to miss school and for costs and attorneys' fees.

This action was filed with this Court on March 17, 1969. On Tuesday, March 18, the Court heard arguments on the plaintiff's motion for a temporary restraining order, as described above. At that time counsel for the defendants represented to the Court that the School Board had a general policy against the wearing of buttons and other insignia and that the School Board feared a disruption in the normal school activities if any buttons were permitted to be worn. The Court was of the opinion that if these representations were true and if the Court were to restrain the defendants pending a hearing on the plaintiff's motion for a preliminary injunction, disruption of the normal activities of Shaw High School would occur. The defendants also represented that they were willing to permit the plaintiff to return to classes without his button; and, under these circumstances, the Court concluded that it was more likely that irreparable harm would befall the defendants in the event this Court issued a temporary restraining order than would befall the plaintiff if the Court declined to issue a temporary restraining order. Therefore, the Court overruled the plaintiff's motion for a temporary restraining order and set this matter down for a hearing on the plaintiff's motion for preliminary injunction at the earliest possible date.

On March 21, 1969, this Court began an evidentiary

hearing on the plaintiff's motion for a preliminary injunction. That evidentiary hearing continued until Wednesday, March 26. More than 30 witnesses were heard; numerous exhibits were submitted to the Court. On the basis of the evidence adduced at that hearing, the Court makes the following determination.

FINDINGS OF FACT.

Certain of the factual issues in this case were not disputed. Many, however, were. The Court, as in other cases of this nature, is called upon to weigh the testimony of the various witnesses to determine what the true facts are and what the actual occurrences were. Such a determination is always difficult; but it is particularly difficult where, as here, there are direct conflicts in the testimony of the various witnesses.

The Court must give deserving weight to the testimony of each witness. In performing this task, the Court must assess the credibility of each witness. The Court has considered in great depth the demeanor of each witness upon the stand, his opportunity to observe the incidents which he described, and his opportunity to come by the knowledge which he claimed. The Court has also considered the interest and/or bias of each witness and his inclination as to the proper outcome of this case.

In a case where there are substantial factual disputes raised by the testimony of the various witnesses, their demeanor on the stand and their relative degree of knowledge are particularly important. The Court has, therefore, reviewed the evidence and its impressions of the various witnesses and has reached its considered judgment as to the actual facts in this case.

The city of East Cleveland, Ohio, is a suburb located east of Cleveland. At one time, it was an almost exclu-

sively white community. In the last few years, however, many negroes have moved into the community from Cleveland, which is immediately adjoining; and East Cleveland now is a racially mixed community.

The East Cleveland Board of Education governs and regulates the operations of the East Cleveland schools. The City has a number of elementary schools; it has one junior high school, Kirk Junior High; and its only high school is Shaw High.

Shaw High School is not a new institution. It has served the East Cleveland community for at least fifty years. The main school building is old; and as a result of the increased number of students, other buildings have been added to Shaw High. Certain of the other buildings are attached to the main school building by a series of tunnels; at least one of the school buildings is not attached to the main building at all.

Because of the layout of the various buildings at Shaw High School, traffic patterns are bad. Since many of the buildings are old, the corridors, originally built for fewer students, are now congested. There are presently 1900 students at Shaw. The tunnels, in particular, are very crowded. The students are often required to walk long distances to their next class. Some chose to walk outside the building, even in inclement weather, to avoid the congestion and inconvenience of a trip through the tunnels.

Approximately 70% of the students at Shaw High School are black. Approximately 30% are white. There has been considerable friction between the students of the two races. There has also been friction among students of the same race. Nonetheless, Shaw High School has not, as yet, had a serious racial disturbance.

At the same time, many other high schools in the area have had such disturbances. At John Hay High, a

predominately black school approximately one mile to the west, there have been repeated disturbances;* and, in fact, John Hay High School was forced to close for a number of days as a result of these.

East High School and Glenville High School have also had serious disturbances. East High was also required to close. Both of these high schools have a high percentage of black students.

Collinwood High School, which is racially mixed, has had serious disturbances. Indeed, these required the closing of the school at one time this year.

So far there have been no crippling disruptions at Shaw High. The situation, however, is not peaceful.

Although there have been no crippling disruptions of school activities, Shaw High has a significant, perhaps serious, discipline problem. Students have been threatened in both the men's rooms and locker rooms, among other places. These threats have often been accompanied by violence. Money has been extorted from students under these circumstances. The problem has been of such significance that the P.T.A. and other groups in the community have become concerned. There have been numerous fights at Shaw, both between blacks and whites and among students of the same race. These fights have occurred both during school hours and in the evening.

Tension at Shaw High is at an incendiary point. The school officials spend a great portion of their time disciplining students in an attempt to control this situation.

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* The disturbances at John Hay High School were not the result of racial incidents or disruptions between black and white students at John Hay High. They appear to have been the result of tensions and disagreements between the students and the administration of the school and had racial overtones.
(This footnote added by District Court in Amending its Opinion.)

In January of this year, black students attempted to organize a walkout. Such walkouts have occurred in a number of the other schools in the area. Shaw High officials were forced to call police to the school. The walkout was aborted, and only one student actually left the school.

These are but a few of the incidents described to the Court. It appears that the principal reason why more such incidents have not occurred is the extensive effort by school officials to avert such situations by maintaining discipline and discussing these problems with the students and their parents.

For many years Shaw High has had an informal rule with respect to the wearing of emblems and other insignia. The rule has never been published; nevertheless, it has been applied uniformly and consistently for at least forty years at both Shaw High School and Kirk Junior High. To summarize the rule, it provides that students will not be permitted to wear buttons, emblems, or other insignia on school property during school hours unless these emblems or insignia are related to a school activity.

This informal rule has been applied in a wide variety of situations. School officials have applied it against the high school fraternities and sororities which existed at Shaw in the 1940's. Emblems signifying or indicating membership in any of these fraternities were prohibited. Students wearing them were asked to remove them or leave school.

Subsequently, informal clubs replaced the outlawed high school fraternities. The rule was applied to these clubs. Pins, emblems, lavalieres, lettering on clothing and other insignia have not been permitted at Shaw High School.

The rule was created in response to a problem which Shaw has had over a period of many years. At the time

high school fraternities were in vogue, the various fraternities at Shaw were a divisive and disruptive influence on the school. They carved out portions of the school cafeteria in which only members of a particular fraternity were permitted to sit. The fraternities were competitive and engaged in activities which disrupted the educational process at Shaw. There were fights between members of the individual fraternities and often strong feelings between the members.

The same problem was encountered with the informal clubs, which replaced high school fraternities and sororities. The problem again exists as a result of the racial mixture at Shaw. Buttons, pins, and other emblems have been used as identifying "badges." They have portrayed and defined the divisions among students in the school. They have fostered an undesirable form of competition, division and dislike. The presence of these emblems, badges and buttons are taken to represent, define and depict the actual division of the students in various groups.

The buttons also encourage division among the students, for they portray and identify the wearer as a member of a particular group or the advocate of a particular cause. This sets the wearer apart from other students wearing different buttons or without buttons. It magnifies the differences between students, encourages emphasis on these differences, and tends to polarize the students into separate, distinct, and unfriendly groups. In addition, there have been instances in which students have attempted to force other students to wear a particular manner of dress or to wear their particular insignia or expressive button. For these reasons Shaw High officials have enforced the anti-button rule and have prohibited the wearing of such indicia.

The rule has acquired a particular importance in recent years. Students have attempted to wear buttons

and badges expressing inflammatory messages, which, if permitted, and as the evidence indicates, would lead to substantial racial disorders at Shaw. Students have attempted to wear buttons with the following messages inscribed thereon. "White is right"; "Say it loud, Black and Proud"; "Black Power." Other buttons have depicted a mailed black fist, commonly taken to be the symbol for black power.

There have been occasions when the wearing of such insignia has led to disruptions at Shaw and at Kirk Junior High. A fight resulted in the cafeteria when a white student wore a button which read "Happy Easter, Dr. King." (Dr. Martin Luther King was assassinated in the Easter season.)

School authorities have attempted to eliminate the wearing of buttons, emblems, other insignia, and distinctive forms of dress characteristic of a particular club or group. The evidence discloses a number of instances in which various individuals and groups attempted to wear such insignia or clothing and in which the school officials prohibited it. The evidence also discloses isolated instances in which buttons or other insignia have been worn. It appears, however, that in these cases the wearing was not the result of permission by the school authorities, but was rather the case of the particular emblem going unnoticed.

On March 11, 1969, the plaintiff, Thomas Guzick, Jr., in the company of Hunter Havens, went to the office of the principal of Shaw High, Mr. Donald Drebus. Both the plaintiff and Mr. Havens wore a button on their clothing inscribed with the message:

"April 5 Chicago
G.I. Civilian
Anti-War
Demonstration
Student Mobilization Committee"

Plaintiff also carried certain leaflets which he and Mr. Havens desired to distribute at Shaw High School.

The conversation had that morning between the two students and Mr. Drebus is in dispute. It appears, however, that the students requested permission to pass out the leaflets at school. Mr. Drebus refused permission, stating that Shaw High had a policy against distribution of leaflets. Mr. Drebus demanded that the students remove the buttons which they were wearing. The students asserted that they had a constitutional right to wear such buttons. Hunter Havens removed his. The plaintiff, however, refused to remove his button, even after a warning by Mr. Drebus that he would suspend the plaintiff from school if he refused to remove it. Upon the plaintiff's further refusal to remove the button, he was suspended from school until such time as he returned without the button. Subsequently, the plaintiff filed suit with this Court seeking a legal determination whether he is entitled under the Constitution to wear this button at Shaw High School.

As outlined above, the Court has concluded that Shaw High School has had a long-standing and consistently-applied rule prohibiting the wearing of buttons and other insignia on school grounds during school hours, unless these are related to a school-sponsored activity. The Court finds that this rule has been a significant factor in preserving peace and good order at Shaw High School and in preventing provocations, distractions, and disruptive conduct. The Court finds that if this policy of excluding buttons and other insignia is not retained, some students will attempt to wear provocative or inciting buttons and other emblems. If these provocative buttons and insignia are permitted to be worn, they will further amplify an already serious discipline problem, they will exacerbate

an already tense racial situation, and they will inevitably cause substantial disruptions in the educational process at Shaw High.

The Court further finds that if students are permitted to wear *some* buttons but not others, similar disruptions of the educational process will occur. Many students will not understand the justification for any rule that prohibits the wearing of certain buttons while permitting others. Many will not accept the distinction.

In addition, any rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer. It would involve school officials in a continuous search of the halls for students wearing the prohibited type of buttons. It would occasion ad hoc and inconsistent application. It would make the determination of permissible versus impermissible buttons difficult, if not impossible. It would make it difficult for the school officials to give both the substance and appearance of fairness, and would deprive the school officials of their present position of neutrality.

A rule which permitted the wearing of some buttons but not others would itself be disruptive. Many of the buttons which are most sought to be worn are of the provocative and inciting type. If a line is drawn between provocative and non-provocative buttons, the students most desiring to wear buttons, who desire to wear buttons of a provocative type, will feel discriminated against. As one of the witnesses indicated, there are many people both in the school and in the community who are looking for an incident upon which to base a disruption of the Shaw High School educational process. The wearing of buttons at Shaw High would greatly affect the discipline problem and will require that school administrators devote an even greater portion of their time to discipline.

Buttons will raise the emotions of students at Shaw High, distract them from their educational pursuits, and exacerbate a type of racial tension which is "peculiar to Shaw," as one witness put it.

As the Court has found above, a rule permitting the wearing of some buttons and not others will itself lead to disruptions of the educational process at Shaw. Similarly, the rule which permits the wearing of any button will occasion the wearing of provocative and inciting buttons and will also disrupt the educational process.

The Court finds that the prohibition of buttons and other insignia at Shaw High significantly contributes to the preservation of peace and order, and that the blanket prohibition of buttons and other insignia is reasonably related to the prevention of the distractions and disruptive and violent conduct at Shaw High. The Court finds that if all buttons are permitted or if any buttons are permitted, a serious discipline problem will result, racial tensions will be exacerbated, and the educational process will be significantly and substantially disrupted.

CONCLUSIONS OF LAW.

On February 24, 1969, the United States Supreme Court decided *Tinker v. Des Moines Independent Community School District*, ____ U.S. ____, 37 Law Week 4121. This is the landmark case in the area of the student's rights to face speech in the public schools, and it is has formed the basis of this litigation.

The *Tinker* case involved the wearing of black arm bands in protest against this country's involvement in the Vietnam War. The Supreme Court invalidated a school regulation prohibiting the wearing of these arm bands.

The Court noted that the wearing of an expressive

arm band is "closely akin" to "pure speech." It was, in substance, the silent expression of an idea.

The *Tinker* case holds:

> "Where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." 37 Law Week at 4123.

In the *Tinker* case there was, of course, no such disruption. Rather, the Supreme Court concluded that the action of the school officials was based on an "undifferentiated fear" that a disturbance *might* be occasioned by the wearing of the arm bands and any ensuing discussions or arguments.

There was little evidence in *Tinker* to indicate that a disorder might arise from the wearing of buttons. One graduate of the school had been killed in the Vietnam War; and the school board feared that if any demonstration began, it might evolve into something which might be difficult to control. In addition, some of the other students indicated that, if the black arm bands were permitted, they might wear different colored bands. As the Supreme Court stated, there was no evidence the school authorities "had reason to anticipate that the wearing of the arm bands would substantially interfere with the work of the school or infringe on the rights of other students." 37 Law Week at 4123. The Court noted: "As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption or a material interference with school activities, and no disturbances or disorders on school premises in fact occurred." 37 Law Week at 4123.

The regulation in the *Tinker* case was not applied in

an even-handed manner. Other buttons and symbols of political and controversial significance were permitted to be worn in the school. The Court concluded that the regulation was directed at the principle expressed in this particular demonstration—that is, opposition to the Vietnam War. The school authorities, the Court concluded, wanted not to introduce the Vietnam controversy into the school.

Certain factors, present in the *Tinker* case, and upon which the Court rested its decision, are not present here. The rule prohibiting the wearing of emblems at Shaw High School is one of long standing. It has been applied even-handedly both in politically controversial and non-controversial areas. The Shaw High authorities have prohibited black students from wearing various emblems depicting Dr. Martin Luther King and espousing the ideas of black power. They have prohibited white students from wearing buttons and other emblems depicting their ideas on the racial situation. They have prohibited the wearing of fraternity, sorority, and other club insignia. They have applied this rule consistently; they have applied it equally. The rule is applied (and it is applied in this case) without regard to the content and the ideas sought to be expressed in the emblem. It is applied without regard to the status of the wearer or to the message, inflammatory or innocuous, sought to be expressed.

Furthermore, there is in the present case much more than an "undifferentiated fear or apprehension" of disturbances likely to result from the wearing of buttons at Shaw High School. The wearing of buttons and other emblems and insignia has occasioned substantial disruptive conduct in the past at Shaw High. It is likely to occasion such conduct if permitted henceforth. The wearing of buttons and other insignia will serve to exacerbate an already tense situation, to promote divisions and disputes,

including physical violence among the students, and to disrupt and interfere with the normal operation of the school and with appropriate discipline by the school authorities.

The button at issue in the instant case did not convey an inflammatory message. It does, however, portray the position of the wearer with respect to a political issue. Although there was evidence that the message conveyed in this particular button might be such as to inflame some of the students at Shaw High, the Court does not feel that such a result is likely.

On the other hand, if this button were permitted by the school authorities, there would no longer be a rule prohibiting all emblems and insignia at Shaw High School. The school authorities would be faced with a situation in which they would have to decide whether to permit all buttons or to permit some, but not all, buttons.

The Court has concluded that if all buttons were permitted at Shaw High, many students would seek to wear buttons conveying an inflammatory or provocative message or which would be considered as an insult or affront to certain of the other students. Such buttons have been worn at Shaw High School in the past. One button of this nature, for example, contained the message "Happy Easter, Dr. King." This button caused a fight last year in the school cafeteria at Shaw. Other buttons, such as "Black Power," "Say it loud, Black and Proud," and buttons depicting a black mailed fist have been worn at Shaw and would likely be worn again, if permitted. These buttons would add to the already incendiary situation and would undoubtedly provoke further fighting among the students and lead to a material and substantial disruption of the educational process at Shaw High.

To avoid the situation in which inflammatory and often insulting buttons would be worn at Shaw High, the

school administration would be required to adopt a policy permitting certain buttons and excluding others. Such a policy would be unworkable in the context of Shaw High School and would very likely lead to disruption itself. It would be nearly impossible for the school authorities to adopt and define a policy which would satisfactorily distinguish between buttons which would be permitted and those which would not.

Any attempt to enforce such a policy would likely entangle the school authorities in the First Amendment prohibition against prior restraints on free speech. In addition, such a policy could not practically be enforced, for it would require the school authorities to patrol the halls and classes in search of offending buttons. It is unlikely that the students would understand or agree with the basis for the permission and exclusion of various buttons, even if the policy were announced as a general written rule. It would be virtually impossible to distinguish between buttons on any permissible basis, since even innocuous buttons on certain issues would inflame the situation at Shaw High and inflammatory buttons on other issues would have no effect.

School discipline at Shaw is possible because it is administered on an impartial basis. School authorities have attempted to maintain both the position and image of complete neutrality. The adoption of a rule permitting some buttons and excluding others would necessarily involve the school administration in the controversies at Shaw High. The school authorities would no longer be neutral regulators but active participants. This itself would undermine the structure of discipline at Shaw High and materially and substantially affect the educational process.

The school authorities have adopted the policy of excluding all insignia and emblems, in view of the explosive

situation and the likelihood of substantial disruption if provocative emblems are permitted. This Court is unprepared to say that the rule excluding all buttons is unreasonable, in view of the difficulty in applying a selective rule and in view of the real likelihood that such a rule would itself contribute to disruption. This Court is also unprepared to say that the school authorities were unreasonable in rejecting such a selective rule.

The chain of events likely to occur if buttons are permitted at Shaw High is fairly certain. If one button is worn with school permission, then other buttons would also be worn. The school would be unable to enforce a policy which attempts to exclude some buttons. Students will feel that if some individuals are permitted to wear buttons of their choice, then all should be permitted to wear buttons of their choice. Inflammatory and provocative buttons will undoubtedly be worn; they will undoubtedly lead to fights and disruptions, walkouts, and an explosive racial situation. In the present case, unlike the *Tinker* case, there is more than an "undifferentiated fear" of a disturbance. There is a history of such disturbances caused or provoked by emblems. There is good reason to anticipate that disturbances will result in the future, if buttons are permitted. An uneasy truce exists now between the various groups in which there is a tacit understanding that buttons will not be worn by anyone. If one button is worn with school permission, then others will deem themselves deprived, if they are not also permitted to wear the buttons of their choice.

In the instant case, the wearing of the buttons is substantially related to the occurrence of conduct which school authorities are entitled to prevent. They have, therefore, applied the rule at issue here. They have applied it in an evenhanded manner; they have applied it consistently. This Court concludes that such a rule is reasonably related

to the prevention of disruptive conduct at Shaw High School.

The wearing of buttons or, as in the *Tinker* case, wearing of arm bands is itself and without accompanying conduct "closely akin" to "pure speech." Nevertheless, wearing of such insignia has other characteristics different from pure speech. A button is not merely a statement; it is an identification tag. It identifies the wearer as an adherent or member of one group or class. It identifies him as not being a member of other groups or classes. This identification aspect exists independent of the nature of the message contained in the button. Thus, for example, a button on which appears a mailed black fist certainly identifies the wearer with a particular political persuasion. This is apart from any message sought to be conveyed by the button.

The button also demonstrates that the wearer has a particular and keen interest in the goals and outlook of the group with which the button identifies him. It marks the wearer as a proponent; it also may mark him as someone's opponent. In so doing, buttons have an inherent tendency to divide a body of individuals into separate subgroups, each identified by its own insignia, each declaring by a particular decoration its position in relation to other individuals. Such an effect may not be significant in the context of many high schools in this country. But because of the "peculiar situation" at Shaw High, this divisive influence is likely and, indeed, almost certain to lead to disruptive conduct. When there is added the fact that many of these expressive buttons are likely to convey that expression in a most inflammatory and, perhaps, insulting manner, it is apparent that a most dangerous situation will result.

Free speech is the single most important element upon

which this nation has thrived. Wherever reasonably possible, it must be upheld, cherished, and nurtured. There are, however, situations in which free speech, or manifestations which are "closely akin" to free speech, must be exercised with care and restraint; and there are situations in which the manifestations of speech may even be prohibited altogether. It has been demonstrated that the identifying aspects of buttons and other insignia have led to considerable disruption at Shaw High in the past. It has also been demonstrated that such insignia would be likely and, indeed, more likely to lead to such disruptions if permitted now.

We bear in mind that the buttons and other insignia are not speech themselves. Rather, they are a pictorial manifestation of speech. As such, they acquire other characteristics which would not be possessed by the spoken word itself. Buttons and other insignia have an inherently identifying nature. They are in a sense "badges." It is this aspect of emblems and other insignia that has caused difficulty at Shaw High. It is this aspect, and not the actual speech of any of the students, which has been prohibited and which is at issue here.

Perhaps the best example of the dichotomy between that which school officials may prohibit and that which they must permit is presented by two cases decided by the United States Court of Appeals for the Fifth Circuit on the same day. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) is the first of these cases.[1] Students there were seeking to wear buttons bearing the message "one man one vote" around the perimeter with "SNCC" inscribed in the center. The school officials prohibited them from wearing these buttons and suspended a number of students for re-

[1] This case was specifically relied upon by the Supreme Court in the *Tinker* case.

fusing to remove them. According to the school officials, they prohibited the buttons because they feared that they would cause a commotion and because they had no bearing on the students' education. The school authorities were afraid that buttons would be passed around and discussed in the classrooms. There was evidence that they did cause a "commotion" in the halls when they were passed out as students sought to see the buttons. The Court characterized the response of the students to these buttons as "mild curiosity." The school authorities had only prohibited the wearing of what were termed "freedom buttons," and had permitted the wearing of other buttons of a political nature.

The Court invalidated the regulation on the grounds that it was "arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression." 363 F.2d at 748, 749.

The Court noted that the state and school officials had a substantial interest in providing for an orderly educational process, and that the school officials have wide discretion in prescribing rules of conduct:

> "The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning. In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable

exercise of the power and discretion of the school authorities." 363 F.2d at 748.

The Court also defined what it would consider to be a reasonable regulation:

> "Regulations which are essential in maintaining order and discipline on school property are reasonable. Thus school rules which assign students to a particular class, forbid unnecessary discussion in the classroom and prohibit the exchange of conversation between students are reasonable even though these regulations infringe on such basic rights as freedom of speech and association, because they are necessary for the orderly presentation of classroom activities. Therefore, a reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system." 363 F.2d at 748.

The other case decided by the Fifth Circuit on that day is *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). The students in the *Blackwell* case also wore SNCC buttons. In addition to the inscription, they depicted a black and white hand joined together. In the *Blackwell* case, however, the buttons had occasioned disruptive conduct by the pupils. They passed them out in the corridors of the school and attempted to pin them on students who did not want them. When told to remove the buttons, the students were belligerent and insulting. When told to leave school, they disrupted some of the classes. After a number of attempts to have the students remove the buttons, the students were told that they would be suspended unless they removed them. A number of students did not; they were suspended and litigation ensued.

The Court in the *Blackwell* case found that the regulation in question was reasonable. Citing its opinion in

Burnside, it defined a reasonable regulation as "* * * one which is 'essential in maintaining order and discipline on school property' and 'which measurably contributes to the maintenance of order and decorum within the educational system.' " 363 F.2d at 753.

In the *Blackwell* case, the prohibition against buttons was reasonably related to the prevention of the disruptive conduct. The buttons had been the occasion of this conduct. The school authorities were entitled to prevent the conduct, and the prohibition against buttons was reasonably related to prevention.

Applying the above principles to the present case, it appears that the regulation must be upheld. The prohibition of buttons and other insignia at Shaw High is the result of a history of problems which the Shaw High authorities have encountered as a result of this activity. The prohibition against buttons is reasonably related in preventing the occurrence of disruptive conduct. It is also reasonably related to what is administratively possible at Shaw High School. If any buttons are permitted to be worn at Shaw High, it is likely that students will require that all buttons be permitted. In any event, the wearing of any buttons will lead to disruptive, even violent, activities, will materially and substantially affect the normal educational processes at Shaw High, and will diminish significantly the ability of the school officials to maintain proper discipline.

In this case, it is relevant that the school authorities *did* prohibit the wearing of all symbols and applied the rule uniformly and consistently. This was not the case in *Tinker*.

It is also relevant that the wearing of a button by the plaintiff in this case was associated with a distribution of leaflets. This was not the case in *Tinker*.

An evidentiary pattern has developed in this case which specifically shows to this Court that the school authorities had a constitutionally valid reason to regulate student conduct regarding the wearing of buttons and other emblems and symbols. This was not the case in *Tinker*.

It is also relevant that buttons of all kinds, shapes and sizes are finding their way into the school system. Many of these are innocuous, many are controversial and provocative, and many are downright immoral and sinister. These buttons find their way into the school system by way of adult groups or organizations of all types seeking to promote their cause by overpowering the tender minds of our youth; others find their way into the schools by way of novelty salesmen capitalizing on the emotional upheaval of the times by printing anything on buttons which will produce a profit.

Now, if all these buttons bore a reasonable relationship to free speech, then, no restraint should be placed on the wearing thereof; but, let's take a look at what is being peddled in the Cleveland area. Buttons with the following inscriptions: "KKK," "White and Right," "Say it loud, Black and Proud," "Happy Easter, Dr. King," a black mailed clinched fist, "Boycott Grapes," and many others too numerous to set forth.

It is also relevant that leaflets of all kinds are being distributed and circulated throughout the public schools, and specifically at Shaw High School, and finding their way on the bulletin boards. Many of these are of a harmless nature, but many of these are downright immoral and sinister, such as, defendants' Exhibit B distributed by SDS, which was posted on the Shaw High School bulletin board. It encourages a demonstration in Washington opposing our political leaders and, among other things, contained this phrase: "Don't let the bastards grind you down!"

It is also relevant in the instant case that one of the pamphlets which was circulated at Shaw High School by the Student Mobilization Committee advertised a city-wide meeting to consider a possible high school strike.

The regulation prohibiting the wearing of the button is an appropriate standard of behavioral conduct which is reasonably relevant to the mission and function of Shaw High School.

The regulation is not discriminatory nor unreasonable, arbitrary or capricious. The rule does not deny a federally protected constitutional right.

Upholding the Shaw High School rule prohibiting buttons or other symbols does not sound the death knoll for student freedom of speech.

The evidence in this case has made it abundantly clear that the school authorities have a factual basis upon which to forecast substantial disruption of, or material interference with, school activities if student behavioral conduct regarding the wearing of buttons is not regulated.

Therefore, the Court finds the issues in this case in favor of the defendants; and the plaintiff's claim for injunctive relief and damages is denied.

It is, therefore, ordered that this cause be and is hereby dismissed and terminated.

THOMAS D. LAMBROS,
United States District Judge.

OPINION OF THE COURT OF APPEALS.

No. 19681

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

THOMAS GUZICK, JR., a minor by his next friend and father, THOMAS GUZICK,

Plaintiff-Appellant,

v.

DONALD L. DREBUS, *et al.*,

Defendants-Appellees.

APPEAL FROM U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

Decided and Filed September 16, 1970.

Before: WEICK, Circuit Judge, and MCALLISTER and O'SULLIVAN, Senior Circuit Judges.

O'SULLIVAN, Senior Circuit Judge. Plaintiff-Appellant, Thomas Guzick, Jr.,—prosecuting this action by his father and next friend, Thomas Guzick—appeals from dismissal of his complaint in the United States District Court for the Northern District of Ohio, Eastern Division. Plaintiff's complaint sought an injunction and other relief against defendant Drebus, the principal of Shaw High School in East Cleveland, Ohio, as well as against the Superintendent and Board of Education for the schools of said city. Plaintiff also asked for declaratory relief and damages.

The complaint charged that Thomas Guzick, Jr., a seventeen year old, eleventh grade student at Shaw High School, had been denied the right of free speech guar-

anteed to him by the United States Constitution's First Amendment. He asserted that this right had been denied him when he was suspended for refusing to remove, while in the class rooms and the school premises, a button which solicited participation in an anti-war demonstration that was to take place in Chicago on April 5. The legend of the button was:

"April 5 Chicago
GI—Civilian
Anti-War
Demonstration
Student Mobilization Committee"

With the currency of reliance on the First Amendment as support for so many and so varied claims for relief in the federal courts, it would be well to remind ourselves of that Amendment's exact language.

> "ART 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

On March 11, 1969, young Guzick and another student, Havens, appeared at the office of defendant Drebus, principal of the high school, bringing with them a supply of pamphlets which advocated attendance at the same planned Chicago anti-war demonstration as was identified by the button. The boys were denied permission to distribute the pamphlets, and were also told to remove the buttons which both were then wearing. Guzick said that his lawyer, counsel for him in this litigation, told him that a United States Supreme Court decision entitled him to wear the button in school. Principal Drebus directed that he remove it and desist from wearing it in the

school. Being told by Guzick that he would not obey, the principal suspended him and advised that such suspension would continue until Guzick obeyed. The other young man complied, and returned to school. Guzick did not, and has made no effort to return to school. This lawsuit promptly followed on March 17. The complaint prayed that the school authorities be required to allow Guzick to attend school wearing the button, that it be declared that Guzick had a constitutional right to do so, and that damages of $1,000 be assessed for each day of school missed by Guzick as a result of the principal's order.

The District Judge denied plaintiff's application for a preliminary injunction, and after a plenary evidentiary hearing, which was concluded on March 26, 1969, the complaint was dismissed. The opinion and judgment of the District Judge were filed and entered on April 2, 1969. The case is reported as *Guzick v. Drebus*, 305 F. Supp. 472 (N.D. Ohio 1969).

We affirm.

Plaintiff insists that the facts of this case bring it within the rule of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction.

The rule applied to appellant Guzick was of long standing—forbidding all wearing of buttons, badges, scarves and other means whereby the wearers identify themselves as supporters of a cause or bearing messages unrelated to their education. Such things as support the high school athletic teams or advertise a school play are not forbidden. The rule had its genesis in the days when fraternities were competing for the favor of the students

and it has been uniformly enforced. The rule has continued as one of universal application and usefulness. While controversial buttons appeared from time to time, they were required to be removed as soon as the school authorities could get to them.

Reciting the history of the no button or symbol rule, and the fact that the current student population of Shaw High School is 70% black and 30% white, the District Judge observed:

> "The rule was created in response to a problem which Shaw has had over a period of many years. At the time high school fraternities were in vogue, the various fraternities at Shaw were a divisive and disruptive influence on the school. They carved out portions of the school cafeteria in which only members of a particular fraternity were permitted to sit. The fraternities were competitive and engaged in activities which disrupted the educational process at Shaw. There were fights between members of the individual fraternities and often strong feelings between the members.
>
> "The same problem was encountered with the informal clubs, which replaced high school fraternities and sororities. The problem again exists as a result of the racial mixture at Shaw. Buttons, pins, and other emblems have been used as identifying "badges." They have portrayed and defined the divisions among students in the school. They have fostered an undesirable form of competition, division and dislike. The presence of these emblems, badges and buttons are taken to represent, define and depict the actual division of the students in various groups.
>
> "The buttons also encourage division among the students, for they portray and identify the wearer as a member of a particular group or the advocate of a particular cause. This sets the wearer apart from other students wearing different buttons or without buttons. It magnifies the differences between students,

encourages emphasis on these differences, and tends to polarize the students into separate, distinct, and unfriendly groups. In addition, there have been instances in which students have attempted to force other students to wear a particular manner of dress or to wear their particular insignia or expressive button. For these reasons Shaw High officials have enforced the anti-button rule and have prohibited the wearing of such indicia.

"The rule has acquired a particular importance in recent years. Students have attempted to wear buttons and badges expressing inflammatory messages, which, if permitted, and as the evidence indicates, would lead to substantial racial disorders at Shaw. Students have attempted to wear buttons with the following messages inscribed thereon. 'White is right'; 'Say it loud, Black and Proud'; 'Black Power.' Other buttons have depicted a mailed black fist, commonly taken to be the symbol of black power.

"There have been occasions when the wearing of such insignia has led to disruptions at Shaw and at Kirk Junior High. A fight resulted in the cafeteria when a white student wore a button which read 'Happy Easter, Dr. King.' (Dr. Martin Luther King was assassinated in the Easter season.)" 305 F. Supp. at 476-77.

From the total evidence, including that of educators, school administrators and others having special relevant qualifications, the District Judge concluded that abrogation of the rule would inevitably result in collisions and disruptions which would seriously subvert Shaw High School as a place of education for its students, black and white.[1]

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[1] He concluded that this was so even though he did not find the message of the particular button inflammatory, per se, "Although there was evidence that the message conveyed in this particular button might be such as to inflame some of the students at Shaw High, the Court does not feel that such a result is likely." 305 F. Supp. at 479.

1. The Rule of Tinker.

Contrasting with the admitted long standing and uniform enforcement of Shaw's no symbol rule, the majority opinion in *Tinker* was careful to point out,

> "It is also relevant that the school authorities [in *Tinker*] did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. *The order prohibiting the wearing of armbands did not extend to these.* Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition." 393 U.S. at 510-511.

The armband demonstration in *Tinker* was a one time affair, with a date for its ending fixed in its original plan. Plaintiff here argues that Shaw's no symbol rule should be abrogated to accomodate his wish to be relieved from obeying it. The majority in *Tinker* emphasized that it was following what had been "the unmistakable holding of this Court for almost 50 years." 393 U.S. at 506. Opinions of Mr. Justice McReynolds in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Bartels v. Iowa*, 262 U.S. 404 (1923), were referred to as announcing the long standing rule that the United States Constitution must be respected by those who operate our public schools. *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) was cited to emphasize the relevancy of the First Amendment in public school administration. However, *Meyer* and *Bartels* struck down state statutes which forbade the teaching of a foreign language to young students and *Barnette* held that it was constitutionally impermissible to compel young students to salute the flag. These authorities, while

they do confirm the presence of the Constitution in our public schools, bear no resemblance to the critical facts of the case at bar. Neither do any of the other decisions of the Supreme Court cited in *Tinker* on pages 506 and 507 of the opinion.

Further distinguishing *Tinker* from our case are their respective settings. No potential racial collisions were background to *Tinker*, whereas here the changing racial composition of Shaw High from all white to 70% black, made the no symbol rule of even greater good than had characterized its original adoption. In our view, school authorities should not be faulted for adhering to a relatively non-oppressive rule that will indeed serve our ultimate goal of meaningful integration of our public schools. Such was the command of *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. Shaw High School's need for its Rule.

In *Tinker* the Court concluded that a regulation forbidding expressions opposing the Vietnam conflict anywhere on school property would violate the students' constitutional rights,

> "at least *if it could not be justified* by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513 (Emphasis supplied.)

The Supreme Court then went on to say that the District Judge in *Tinker* made no such finding and that,

> "our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspen-

tion that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption." 393 U.S. at 509 (Emphasis supplied.)

But in the case at bar, the District Judge, upon a valid appraisal of the evidence, did find that "if all buttons are permitted or if any buttons are permitted, a serious discipline problem will result, racial tensions will be exacerbated, and the educational process will be significantly and substantially disrupted." 305 F. Supp. at 478. Again in *Tinker*, the majority said,

> "But in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." 393 U.S. at 508.

Here, the District Court, conscious of the commands of *Tinker*, said,

> "Furthermore, there is in the present case much more than an '*undifferentiated fear or apprehension*' of disturbances likely to result from the wearing of buttons at Shaw High School. The wearing of buttons and other emblems and insignia has occasioned substantial disruptive conduct in the past at Shaw High. It is likely to occasion such conduct if permitted henceforth. The wearing of buttons and other insignia will serve to exacerbate an already tense situation, to promote divisions and disputes, including physical violence among the students, and to disrupt and interfere with the normal operation of the school and with appropriate discipline by the school authorities." 305 F. Supp. at 479 (Emphasis supplied).

The District Judge was of the view that the situation at Shaw was "incendiary." The evidence justified such a view.

> "The Court has concluded that if all buttons were permitted at Shaw High, many students would seek to

wear buttons conveying an inflammatory or provocative message or which would be considered as an insult or affront to certain of the other students. Such buttons have been worn at Shaw High School in the past. One button of this nature, for example, contained the message 'Happy Easter, Dr. King.' This button caused a fight last year in the school cafeteria at Shaw. Other buttons, such as 'Black Power,' 'Say it loud, Black and Proud,' and buttons depicting a black mailed fist have been worn at Shaw and would likely be worn again, if permitted. These buttons would add to the already incendiary situation and would undoubtedly provoke further fighting among the students and lead to a material and substantial disruption of the educational process at Shaw High." 305 F. Supp. at 479, 480.

Further distinction from *Tinker* is provided by the long standing and universal application of Shaw's rule. In *Tinker* the majority said:

"The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditional a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition." 393 U.S. at 510, 511. (Emphasis supplied.)

The District Judge here points out that for school authorities to allow some buttons and not others would create an unbearable burden of selection and enforcement. He said:

"In addition, any rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer. It would involve school officials in a continuous search of the halls for students wearing the prohibited type of buttons. It

would occasion ad hoc and inconsistent application. It would make the determination of permissible versus impermissible buttons difficult, if not impossible. It would make it difficult for the school officials to give both the substance and appearance of fairness, and would deprive the school officials of their present position of neutrality." 305 F. Supp. at 477-478.

We believe that the Supreme Court has commanded that, when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider them not "clearly erroneous" as that term is employed in Rule 52(a) F.R.Civ.P. We must make our own examination of the material from which decision is made. *Feiner v. New York*, 340 U.S. 315, 322-325 (1951) (Black, dissenting); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964).

Obedient to that rule, we have made our own examination of the record before us and are persuaded that the factual findings of the District Judge are fully supported by the evidence and we agree with them.

The majority opinion in *Tinker* discusses the Fifth Circuit's decisions of *Burnside v. Byars*, 363 F(2) 744 (5th Cir. 1966) and *Blackwell v. Issaquena County Bd. of Educ.*, 363 F(2) 749 (5th Cir. 1966). At first view, these cases appear to be "on all fours" with the case at bar. In the *Burnside* case, students were held, as an exercise of free speech, to be entitled to wear buttons with the legend "One Man, One Vote" around the perimeter and "SNCC" inscribed in the center, notwithstanding the school authorities' order to take them off. In that case, however, there had been no previous rule of general application prohibiting the wearing of all buttons. Neither did the wearing of such buttons cause any disturbance at the time involved, nor had button wearing caused any past

disturbances. In holding that the school authorities were required to allow the buttons, the Court said,

> "Thus it appears that the presence of 'freedom buttons' did not hamper the school in carrying on its regular schedule or activities, nor would it seem likely that the *simple wearing of buttons unaccompanied by improper conduct* would ever do so. Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which are protected methods of expression, but all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the 'freedom buttons,' the principal would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable." 363 F(2) at 768 (emphasis supplied).

In the *Blackwell* case, buttons were forbidden which evidently came from the same source as those in *Burnside*, but their legends consisted of the marginal position of SNCC and the depicting of a black and a white hand joined together. We find this legend not provocative, but its original appearance in the school and its wearing by many after the School Board had forbidden it caused quite serious commotion, in fact, "all hell broke loose." Students were suspended and they and their parents sought to have the school authorities enjoined from forbidding the wearing of the button. Here the Fifth Circuit sustained District Court denial of the injunction, notwithstanding its *Burnside* decision, announced the same day. It did so because the proofs showed that the *Blackwell* button caused trouble and the *Burnside* button did not. That the button was the cause of trouble in *Blackwell* is made clear by the Court's assertion, "In this case the

reprehensible conduct described above was so inexorably tied to the wearing of the buttons that the two are not separable." 363 F(2) at 734. We can imagine no more cogent argument for Shaw's long standing and all-inclusive "no button" rule than the facts of *Burnside* and *Blackwell*.

The button in *Blackwell* was an invitation to friendship between the blacks and whites. What more non-controversial message could there be? But it caused serious trouble. Certainly the message of the *Guzick* button, supportive of a divisive demonstration, was more provocative than the *Blackwell* button's reach for friendship. Counsel for plaintiffs' brief candidly asserts:

> "There is rebelliousness among Shaw students. In January of 1969 a planned walkout of black students was aborted only when Drebus called in the police. In the aftermath Drebus and his staff interrogated three hundred black students. The demonstrement was a public statement issued by Drebus in which he said:
>
> 'We will take every positive action necessary to make sure that no organization or group of organizations, no teacher or group of teachers, no parents or group of parents, and no students or group of students hinder Shaw High pupils in their quest to obtain their purposeful goals and future opportunities.'"

In our view, the potentiality and the imminence of the admitted rebelliousness in the Shaw students support the wisdom of the no-symbol rule. Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished.

3. Conclusion.

We will not attempt extensive review of the many great decisions which have forbidden abridgment of free speech. We have been thrilled by their beautiful and impassioned language. They are part of our American heritage. None of these masterpieces, however, were composed or uttered to support the wearing of buttons in high school classrooms. We are not persuaded that enforcement of such a rule as Shaw High School's no-symbol proscription would have excited like judicial clamics. Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would, impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities.

Mr. Justice Douglas spoke for a majority of the Court in *Terminiello* v. *Chicago*, 337 U.S. 1, (1949) which had to do with utterances made at a public meeting in a Chicago auditorium. Describing the nature of free speech, he said:

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U.S. at 4.

However correct such language when applied to an open public protest meeting, we doubt the propriety of protecting in a high school classroom such aggressive and colorful use of free speech. We must be aware in these contentious times that America's classrooms and their environs will lose their usefulness as places in which to

educate our young people if pupils come to school wearing the badges of their respective disagreements, and provoke confrontations with their fellows and their teachers. The buttons are claimed to be a form of free speech. Unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such right.

All Courts and constitutional writers have emphasized the need for proper balancing in the exercise of the guarantees of the Constitution. In *Burnside*, *supra*, the Fifth Circuit observed:

> "The interest of the state in maintaining an educational system is a compelling one, giving rise to a *balancing of First Amendment rights* with the duty of the state to further and protect the public school system." 363 F(2) at 748 (Emphasis supplied).

In his monograph "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," Mr. Justice William Brennan emphasized the propriety of this balancing:

> "The 'redeeming social value,' 'clear and present danger,' and 'balancing' tests recognize *some governmental power to inhibit speech*, but it must also be said that none of these limitations has been given an across-the-board application. Each has been primarily utilized to sustain governmental regulation in particular contexts: 'the redeeming social value' test primarily in obscenity cases; the 'clear and present danger' test primarily in regulation of subversive activity and of the publication of matter thought to obstruct justice; *and the 'balancing' test primarily in the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise.*" 79 Harv. L. Rev. 1, 11 (1965). (Emphasis supplied.)

The complaint's contention that Guzick was denied equal protection of the law is not argued to this Court; neither is it now asserted that he was denied due process of law in the method by which the relevant discipline was imposed.

Judgment affirmed.

McAllister, Senior Circuit Judge, dissenting. When a few students noticed the button which appellant was wearing, and asked him "what it said," appellant's explanation resulted only in a casual reaction; and there was no indication that the wearing of the button would disrupt the work and discipline of the school.

I am of the opinion that the judgment of the district court should be reversed and the case dismissed upon the authority of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

JUDGMENT OF THE COURT OF APPEALS.

(Filed September 16, 1970.)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,681.

THOMAS GUZICK, JR.,
A Minor, by His Next Friend and Father,
THOMAS GUZICK,
Plaintiff-Appellant,

vs.

DONALD L. DREBUS, *et al.*,
Defendants-Appellees.

BEFORE: WEICK, Circuit Judge, MCALLISTER and O'SULLIVAN, Senior Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

LIBRARY

In the Supreme Court of the United [redacted]

[redacted]

No. [redacted]

[redacted]

A minor, by his next friend and father,
Thomas Owens,
Petitioner,

vs.

DONALD L. [redacted], et al.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1109.

THOMAS GUZICK, JR.,
A minor, by his next friend and father,
THOMAS GUZICK,
Petitioner,

VS.

DONALD L. DREBUS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinions of the District Court and the Court of Appeals for the Sixth Circuit are fully presented in the Brief for the Petitioner. The opinion of the Court of Appeals is now reported at 431 F.2d 594 (6th Cir. 1970).

JURISDICTION.

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are adequately set out in the Brief for the Petitioner.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Whether public high school officials can, without violating the First Amendment rights of a student, suspend him for conduct which will materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

2. Whether public high school officials can enforce, even-handedly, a forty-year-old rule forbidding the wearing of insignia when the rule's sole purpose and effect is to prevent material and substantial interference with the requirements of appropriate discipline in the operation of the school.

3. Respondents accept Question 3 as presented in the Brief for Petitioner.

4. Whether the particular environment of one public high school permits school officials there to enforce a rule which prohibits students from wearing insignia which they might have been permitted to wear at other public high schools.

COUNTER STATEMENT OF THE CASE.

For more than forty years Shaw High School in East Cleveland, Ohio ("Shaw") has had a widely publicized and even-handedly enforced rule banning the wearing of all insignia by the students during school hours within the school building, except those insignia which deal with school activities, such as school plays (389a, 398a-401a, 430a-434a, 465a-468a, 380a-381a, 366a, 417a-418a, 50a; R. 525, 538-541, 584-588, 633-636, 512-513, 484, 561-562, 17).

The rule originated to prevent the wearing of high school fraternity pins. It was found that fraternity members would discriminate against non-fraternity members

and fights developed in the corridors, in the lunchrooms and in the locker rooms (398a-399a; R. 538-539).

In the 1950s the rule was applied to prevent student gang members from wearing the names of the gangs on their clothing, e.g. "Vice Lords." Again, it was the experience of the school administrators that gang members, identified by their insignia, would band together to create disturbances and disrupt discipline within the school (399a-401a, 413a; R. 539-541, 557).

By the 1960s the racial composition of the neighborhood wherein Shaw is located had begun to change. More black students were enrolled until, by 1969, about 70 percent of the students, a substantial number of the faculty, school administrators and school board members were black. During this period the insignia rule was evenhandedly enforced to reduce racial tension by preventing both white and black students from wearing inflammatory insignia. "White Power" and "Black Power" buttons were taken from students (430a-433a, 436a-438a, 441a, 448a, 503a-505a; R. 584-587, 590-592, 596, 610, 702-704).

Shaw is housed in aging buildings. Some 1,900 students hurry back and forth to classes through narrow corridors and even through an underground tunnel (405a-409a; R. 545-549). Included in the record is a photograph of students jam-packed together in a corridor (Def. Ex. K, 436a; R. 590, 761). The photograph was used in a campaign for a bond issue to build a new school building. By an unusual coincidence, in the midst of the photograph stares out the troubled face of the plaintiff in the case at bar (407a; R. 547).

In spite of its crowded and confused physical plant, Shaw has tried hard to maintain a good scholastic status (Def. Ex. K, 436a, 420a, 451a; R. 590, 564, 613). Within the structure of the curriculum, every effort is made to

expose the students to the conflicting currents of thought in the adult world. Lectures in black history, theories of Thoreau and peaceful non-violence, as well as discussions of the War in Vietnam are held (511a-515a, 416a, 78a, 545a-547a; R. 711-715, 560, 45, 754-756).

During the fall of 1968 and the winter of 1969 racial troubles plagued every large integrated urban high school on Cleveland's east side except Shaw (111a-112a, 223a, 125a-126a, 230a-231a; R. 79-80, 295, 99-100, 302-303). Riots closed several. One of the riots was over the wearing of a distinctive insignia by a student (225a, 230a-231a; R. 297, 302-303).

In the weeks following the assassination of Martin Luther King racial tensions throughout all integrated public high schools in the Greater Cleveland area intensified. At Shaw a white student's button reading "Happy Easter, Doctor King" was seized. The black students desired to wear medallions bearing Dr. King's picture. School officials met with leaders of the militant wing of the black community and explained the Shaw insignia rule to them. The leaders agreed to advise the community to abide by the rule and the medallions were prohibited, without incident (347a-350a, 432a-437a; R. 463-466, 586-591).

For some time prior to February 24, 1969, certain adult groups in Cleveland had been organizing high school and junior high school students in opposition to the War in Vietnam. "Legal" memoranda had been sent to high school officials throughout the Greater Cleveland area purporting to set forth students' rights to demonstrate and take other action in opposition to the war in Vietnam, such as the wearing of insignia (Plfs. Ex. 19, 20; R. 278, 434, 494, 762). Meetings were held in Cleveland at which students' rights to distribute leaflets were asserted (152a-

161a, 172a-176a; R. 144-153, 183-186). The school officials had agreed to meet with representatives of the American Civil Liberties Union to discuss the issue (410a-411a; R. 554-555).

As the opinion in the Sixth Circuit points out (431 F.2d at 595; Petitioner's Appendix at 48), plaintiff came to school on March 10 and 11, 1969, wearing a button in violation of the insignia rule because his lawyer told him he could do so (152a; R. 144). The alleged statement of the principal, Mr. Drebus, that Supreme Court rulings did not apply at Shaw was contradicted both by Mr. Drebus and the other adult witness to the meeting between the plaintiff and the principal (493a-500a; R. 669-699). The testimony of Mr. Drebus as to what took place at this meeting is illuminating. It is as follows (516a-520a; R. 716-720):

> "They walked into the office and said, 'Mr. Drebus, we are going to pass these pamphlets out today.' My immediate reaction was, 'No, you will not pass them out.' That's actually what I said.
>
> "The boys have said that they would pass them out whether I like it or not, and I told them, 'If you pass out one of those pamphlets in this school today I will suspend you. You are violating the rules.'
>
> ". . . .
>
> "In essence this conversation proceeded for a few seconds. One of the boys again told me that there is a Supreme Court decision recently that said that they could pass out the literature.
>
> "Q. Did he tell you who told them that?
>
> "A. Yes, sir. And then—
>
> "Q. Did he say who told them?
>
> "A. Mr. Gordon. He said Mr. Gordon told them they had the right to do this in school.
>
> "I said, at that time, I told them that we were aware of Mr. Gordon's pamphlet, that we were seek-

ing legal counsel, until then the school ruled what [rule that] we had been enforcing would be enforced. If we found out in the future that our position was not within the realm of the law, we would then alter the position, but until then the rule was in effect and I was bound to enforce it.

"I also asked them after the pamphlet situation to remove their buttons because that was against the rules. They also said at that time that they would not remove them, that I was violating a civil right that they had, and they would see Mr. Gordon about that, in essence.

". . . .

"Well, as I told them that they would have to leave, they said they were going to see Mr. Gordon."

Mr. Drebus then went to the home liaison man and asked him to go to the boy's father and explain what had happened. The boy's father called the principal a few minutes later and said he would send the boy back to school without the button.

However, instead of coming back to school the boy went to see Mr. Gordon, the lawyer, who is still the lawyer, and the case at bar was filed within a week.

There are certain misstatements in Petitioner's brief.

Among these is the allegation of the students' lack of knowledge of the rule regarding insignia. Plaintiff himself knew that his friend had been suspended from school for wearing the same button just a few weeks previously (295a; R. 384). The evidence also showed, as both the District Court and the Court of Appeals have found, that the insignia rule was widely publicized and even-handedly applied to all wearers of insignia (389a, 398a-401a, 430a-434a, 465a-468a, 380a-381a, 366a, 417a-418a, 50a; R. 525, 561-562, 584-588, 634-636, 539-541, 484, 512-513, 17).

Petitioner's argument to the contrary is principally based on the wearing of a Nixon button by one eleventh-grader. The record limits this to a three-hour wearing, which no teacher saw (130a; R. 106). The rule was carefully promulgated to students and parents both in the junior high school and later at the senior high school. The record on this is complete (417a-420a, 430a-437a, 54a; R. 561-564, 584-591, 21).

Petitioner's ludicrous allegation that respondents made only a "meagre showing" that the wearing of the button would substantially and materially interfere with the educational process (Petitioner's Brief at 9) is massively refuted by the record. Among other testimony the following are excerpts from the evidence dealing with the disruption that would occur if the button were permitted to be worn:

George Beasley is employed by the United States Equal Employment Opportunities Commission. He is a black man. He is also a member of the East Cleveland School Board. Two of his children were in Shaw at the time this lawsuit began and one had graduated. Mr. Beasley testified he had been familiar with the insignia rule since 1963 (346a; R. 462). He stated that the wearing of the button by plaintiff would mean that every student in the school should be privileged to wear his or her insignia no matter what it said. He stated this would cause unrest at Shaw and he was certain would lead to fights and disorders (347a, 350a; R. 463, 466). From his experience working in the black community, with CORE, NAACP, Muslims and Black Nationalists, he testified their reaction would be:

> " 'Duke, you had advised that we not wear our buttons and still some of the students are permitted to wear theirs. Why?' It would be a question why a

white kid could and they could not." (349a-350a; R. 465-466.)

His further testimony, on cross-examination, was just as unequivocal (357a-358a; R. 474-475).

> "It is not wearing the button per se. Perhaps you don't understand what I am trying to tell you. It is a very, very real, serious, high tension among black and white in the City of East Cleveland and individuals including myself and many other whites have been working since I went into that area to try to keep the peace. Anything that was said at all, you will have situations like you have had all over this Greater Cleveland area, and if that one button has to cause it, then you have to look very seriously at what that button might do. It is not just a button; that's all they need is some incident, one little grievance that there is not equality in the treatment of blacks and whites and East Cleveland is going up." (360a; R. 477.)

Similar testimony was given by three other school board members, Robert A. Henderson (364a, 366a, 369a-370a; R. 482, 484, 489-490), Leslie Reardon (380a-381a; R. 512-513), and Dr. Irwin Schrader, who is a university professor at Case-Western Reserve (329a-331a, 337a; R. 441-443, 451).

The Superintendent of Schools testified that if the plaintiff were permitted to wear his button it would "greatly affect the discipline, the possibility of commotion and even possibly lead to violence in Shaw" (390a; R. 526). The result would be "disastrous" (392a; R. 528).

John Christopher is the Administrative Assistant to the Superintendent. He happens to be black. His duties require a knowledge of the homes and parents, as well as the students, at Shaw (430a-432a, 449a-450a; R. 584-586, 611-612). His testimony is the most articulate and comprehensive given at the trial on the inevitability of vio-

lence stemming from the wearing of the button (429a-459a; R. 583-621).

Mr. Christopher first explained how the insignia rule was publicized both to children and parents (430a-432a; R. 584-586). He described the incident the year before when a black student wore a medallion with a picture of Martin Luther King on one side and on the other side the inscription "We Shall Overcome." The lad had been stopped in the hall by one of the teachers and asked to put the medallion beneath his outer garment. He refused. Ultimately, Mr. Christopher took him home and met with his mother. The next morning he received a call from the field director of the Committee on Racial Equality, Mr. Arthur Evans. Mr. Evans agreed that if this was the rule of the school then the boy "would have to abide by the rule" (433a; R. 587), and he did.

Mr. Christopher testified that to allow the plaintiff to wear his button would open the door for all other buttons and symbols. He used, as example, two buttons that had been offered in evidence; one said "White and Right" and the other was a black arm raised with a clenched fist. He said that if a white boy wearing a "White and Right" button met a black boy in the crowded corridors at Shaw wearing the black arm button with the clenched fist, "chaos" would result (436a; R. 590). He was asked, suppose the white boy were wearing a little button that said "Happy Easter, Dr. King." The record then reads as follows (437a-438a; R. 591-592):

> "Q. That happened didn't it?
>
> "A. Yes, it did, and it ended up in a fight right there in the cafeteria.
>
> "Q. Boys will be boys, will they not, sir?
>
> "A. But I think it can aggravate boys and cause boys to be more so boys than they would normally have been with such buttons and pins and insignia."

He pointed out that wearing an insignia is "an outward sign that is noticeable [and] will have a tendency to create more of a situation or have a tendency to stir up more hostility because this is overt, this is something we can see" (441a; R. 596).

He finally, after vigorous cross-examination, stated that if the plaintiff wore the button to Shaw he, and the school administration, would be "incapable of controlling the situation that . . . would result" (448a; R. 610); there would be fighting and a riot (458a-459a; R. 620-621).

Strongly similar testimony that the wearing of the button by plaintiff would inevitably lead to substantial disruption in the requirements of appropriate discipline at the school were given by other witnesses. This included the testimony of parents (464a-473a; R. 632-643), P.T.A. members (466a-467a; R. 634-635), a para-professional whose job it was to keep discipline in the cafeteria, the hall-ways and in the girls' restrooms (478a-481a; R. 645-651) and the Assistant Superintendent who had been familiar with the insignia rule since his own high school days at Shaw (404a-416a; R. 544-560).

Both the District Court and the Court of Appeals for the Sixth Circuit reviewed the evidence in depth and found it convincing and undisputed that the wearing of plaintiff's button would inevitably lead to substantial disruption in the educational process and the requirements of appropriate discipline at Shaw High School. To say that such evidence was "meagre," as Petitioner does, is to mislead this Court.

REASONS FOR DENYING THE WRIT.

The petition for a writ of certiorari should be denied because the decisions below correctly applied this Court's opinion in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and effected a result consistent with the concerns voiced in *Tinker*, given obvious differences in the facts of each case. This case does not leave unresolved overriding questions of public policy. Further, a review of lower Federal Court decisions concerning First Amendment rights of public school students, decided since *Tinker*, demonstrates that differences in result arise from correctly applying the *Tinker* criteria to differing fact situations.

1. The courts below correctly interpreted and applied the rule laid down by this Court in Tinker v. Des Moines Independent Community School District.

This Court's decision in the *Tinker* case is completely dispositive of the present action. Both the District Court and the Court of Appeals recognized as controlling and correctly applied the criteria laid down in *Tinker*.

Petitioner's primary ground for urging this Court to grant certiorari is that "the facts of this case [are] identical to the facts in *Tinker*," and therefore should have resulted in a finding against the school, as in *Tinker*. However, both courts below expressly rejected such argument, after reviewing the evidence as summarized in the above counter statement of facts, and specifically found that the factual differences between the instant case and *Tinker* were sufficiently numerous and significant to dictate different results.

The facts confronting this Court in the *Tinker* case were (1) a hastily drawn rule prohibiting black armbands, (2) a school environment devoid of disruption or

turmoil, (3) no attempt by school authorities "to prohibit the wearing of all symbols of political or controversial significance" (393 U.S. at 510), (4) "no threats or acts of violence on school premises" (393 U.S. at 508), and (5) no actual disturbance of the education process or interference with the rights of other students (*id.*).

The *Tinker* decision emphasizes the importance of the factual situation:

> "|*T*|*he record does not demonstrate any facts* which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." 393 U.S. at 514 (emphasis added).

Accordingly, the *Tinker* decision held:

> "Certainly where there is *no finding and no showing* that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. *Burnside v. Byars, supra*, at 749."
>
> "In the present case, *the District Court made no such finding*, ..." 393 U.S. at 509 (emphasis added).

In *Tinker*, this Court faced a record barren of facts sufficient to justify a school's rule prohibiting black armbands. On the contrary, in the present case, the District Court specifically found on the record summarized above:

> "The evidence in this case has made it abundantly clear that the school authorities have a factual basis upon which to forecast substantial disruption of, or material interference with, school activities if student behavioral conduct regarding the wearing of buttons is not regulated." 305 F. Supp. 472, 483-84 (N.D. Ohio 1969); Petitioner's Appendix at 46.

The Court of Appeals conducted an independent examination of the same record and affirmed:

> "Plaintiff insists that the facts of this case bring it within the rule of Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction." 431 F.2d 594, 595 (6th Cir. 1970); Petitioner's Appendix at 49.

Factually, the courts below found this case to be the precise *opposite* of *Tinker*. (1) This was no hastily drawn rule, but a rule "applied uniformly and consistently for at least forty years at both Shaw High School and Kirk Junior High." 305 F. Supp. at 476; Petitioner's Appendix at 29. (2) At Shaw, school authorities were not operating in an environment devoid of disruption, but in a school found by the District Court to have "a significant, perhaps serious, discipline problem," where "|t|ension . . . is at an incendiary point," and "school officials spend a great portion of their time disciplining students in an attempt to control this situation." 305 F. Supp. at 475; Petitioner's Appendix at 28. (3) In *Tinker*, this Court found: "It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance" (393 U.S. at 510); the Shaw rule has been uniformly applied to *all insignia and symbols* not related to school activity. 305 F. Supp. 476, Petitioner's Appendix at 29. (4) No threats or acts of violence occurred in *Tinker*, but buttons have caused at least one fight in Shaw High School, threatened to cause others and have fostered divisiveness and polarization of students groups. 305 F. Supp. at 476-77; Petitioner's Appendix at 30-31.

We agree with Petitioner that a proper interpretation of the *Tinker* case is seen in *Aguirre v. Tahoka Independent School District*, 311 F. Supp. 664 (N.D. Tex. 1970), where the suspension of students wearing brown armbands was held unconstitutional. In *Aguirre* there was no dress regulation in effect and one was hastily promulgated in response to the brown armbands. The Court found no real evidence of disruption, and found that there was "no showing that the wearing of the armbands by plaintiffs and the class they represent would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal educational functions." 311 F. Supp. at 666. However, the opinion goes on to state that in a "more aggravated situation" a finding for the school could be justified, citing *Butts v. Dallas Independent School District*, 306 F. Supp. 488 (N.D. Tex. 1969).

The evidence available in *Tinker* and *Aguirre* was not sufficient to justify the school authorities' "forecast" of interference with school work and rights of other students, and their invocation of a symbol ban. On the clear record of facts existing at Shaw, the courts below found the opposite: that, applying both the letter and the spirit of *Tinker*, there was abundant evidence to justify school administrators' forecasting of interference with the educational process and the rights of other students, and their enforcement of the no-symbol rule.

2. The Shaw rule banning all symbols and insignia, in an effort to cut down on points of friction in a tense school environment, does not raise questions of "overbreadth."

This Court has repeatedly held that the state may not regulate First Amendment rights by means of rules which "sweep overbroadly," thereby prohibiting activities which can be proscribed and those which cannot in the same stroke. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Petitioner has maintained that the doctrine of overbreadth should have been applied to invalidate the Shaw rule because the rule prohibits *all* non-school-related symbols and insignia. Petitioner would require "[c]arefully defined regulations" prohibiting some symbols and permitting others. Presumably, if any semblance of Due Process is to prevail, such regulations would clearly specify those symbolic subjects which are permitted and those which are not.

The impossibility of such attenuated application of the overbreadth doctrine, in the specific situation existing at Shaw, was pointed out by the District Court:

> "[A]ny rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer. It would involve school officials in a continuous search of the halls for students wearing the prohibited type of buttons. It would occasion ad hoc and inconsistent application. It would make the determination of permissible versus impermissible buttons difficult, if not impossible. It would make it difficult for the school officials to give both the substance and appearance of fairness, and

would deprive the school officials of their present position of neutrality." 305 F. Supp. at 477-78; Petitioner's Appendix at 33.

Petitioner would have this Court invoke a "regulatory maze" "wholly lacking in 'terms susceptible of objective measurement.'" *Keyishian v. Board of Regents*, 385 U.S. at 604.

In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), the Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Accord, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507. P. Haskell, "Student Expression in the Public Schools: *Tinker* Distinguished," 59 Geo. L. J. 37, 54 (1970).

In *Tinker*, school administrators performed a deliberate and selective act of suppression directed against symbolic comment on the War in Vietnam. It is precisely to avoid this type of "Big Brother," partisan suppression that Shaw officials enforce a completely neutral rule barring students from this type of non-verbal activity during the school day and within the school grounds. The rule cuts both ways: it bars the high school officials from forcing their own attitudes regarding current controversy on the students, a true detriment to interchange of ideas among the students. A neutral arbiter can inspire respect and encourage cooperation; a partisan selector

of "approved" styles of thinking and types of buttons inspires neither. As stated by Mr. Justice Frankfurter concurring in *Neimotko v. Maryland*, 340 U.S. 268, 275-76 (1951):

> "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing. It is important to bear in mind that this Court can only hope to set limits and point the way. It falls to the lot of legislative bodies and administrative officials to find practical solutions within the frame of our decisions."

3. The Tinker doctrine does not turn on whether the symbol-wearing student is himself disruptive, but whether, in the totality of circumstances, the educational process will suffer disruption.

Curtailing a non-violent person's free speech rights, in order to prevent disturbance by others, is clearly unpalatable when the object sought to be protected from disturbance is the vague notion of "public peace." *Terminiello v. Chicago*, 337 U.S. 1 (1949); *but see*, *Feiner v. New York*, 340 U.S. 315 (1951).

However, *Tinker* recognizes that there are greater limits on expression in the schoolhouse than in the community at large, because of the quite different interests involved. "The school environment is unique due to its physically confining nature, the immaturity of its population and the special demands and needs of the educational purpose." P. Haskell, *supra*, 59 GEO. L. J. at 57-58.

Tinker makes it clear that the need to protect the educational process from disruption arises regardless of who prompts the disruption:

> "But *conduct* by the student, in class or out of it, *which for any reason—whether it stems from time, place,*

> *or type of behavior—materially disrupts classwork* or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (emphasis added).

In effect, Petitioner would have this court shift the focus of its analysis from that established in *Tinker*—whether the educational process itself is subject to material and substantial disruption—and require instead that the decisional focus be placed upon whether or not the rule-violator was objectionable in his behavior.

Tinker held that the school authorities may regulate the wearing of expressive symbols, if they can demonstrate:

> "facts which might reasonably lead school authorities *to forecast* substantial disruption or material interference with school activities . . . ." 393 U.S. at 514 (emphasis added).

Clearly, then, situations arise where school officials' predictions of disorder can and must form the basis for control of symbol wearing.

What does *Tinker* lay down as the necessary basis for such predictions?

> "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . .
>
> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 508-509.

The evidence is overwhelming in the present case that Shaw officials had clear and definite reason to anticipate that the wearing of a button by Petitioner would substantially interfere with the work of the school and impinge upon the rights of other students. As the District Court found:

> "In the present case, unlike the *Tinker* case, there is more than an 'undifferentiated fear' of a disturbance. There is a history of such disturbances caused or provoked by emblems. There is good reason to anticipate that disturbances will result in the future, if buttons are permitted. An uneasy truce exists now between the various groups in which there is a tacit understanding that buttons will not be worn by anyone." 305 F. Supp. at 480; Petitioner's Appendix at 39.

4. No question of denial of equal protection arises in application of a uniform rule to students in one school system, merely because all school systems in the area do not enforce the same rule.

Petitioner requests this Court to recognize that the Shaw no-symbol rule denies equal protection of the law because: (1) some other high schools in the area allow buttons and (2) the rule "is premised on racial factors."

The short answer to this argument is that the Fifth Circuit in dealing with an identical act, the wearing of a button at two separate high schools both located in the southern district of Mississippi, held that prohibition was unconstitutional under one set of facts and constitutional under a second set of facts. Compare *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) with *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). As a footnote shows in the *Burnside* case (363 F.2d at 746,

n. 1), the question of denial of equal protection was raised by the pleadings there but apparently abandoned by plaintiffs and not pressed as an issue on appeal. It is inconceivable that the Fifth Circuit, aware as it was of the equal protection claim, would have reached opposite results in the two cases had the Court not been persuaded that no violation of the equal protection right was involved.

As the Fifth Circuit stated in *Blackwell*: "A valuable constitutional right is involved and decisions must be made on a case by case basis." 363 F.2d at 753.

By comparison, it has been held that the Fourteenth Amendment guarantee of equal protection does not render unconstitutional a school regulation disallowing teachers' beards in one high school despite the fact that beards are allowed at another area high school.

> "|T|he difference in the composition of the student body at the two high schools in Pasadena and the variation in the intensity of desire on the part of their male students to wear beards justifies the difference in the administrative policies . . . ." *Finot v. Pasadena City Board of Education*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520, 525 (1967).

It is also argued that the Shaw symbol rule violates the equal protection clause because it is a "racial" classification. The necessity of the Shaw rule is based upon the regrettable fact of racial tension within the high school, a fact with which administrators and students alike must daily live in uneasy balance. The District Court found conclusively that the racial situation at Shaw was "incendiary." 305 F. Supp. at 475, Petitioner's Appendix at 28. Petitioner has presented no facts or arguments to dispute this obvious, if unfortunate, conclusion. The insignia rule is respected by the broad cross-section

of the East Cleveland community as a bar to escalation of racial conflict.

There can be no doubt that rules which discriminate in their effect between different races are highly suspect under the equal protection clause. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633 (1948). But to argue that a rule prohibiting insignia which applies equally to all students at Shaw regardless of their race, color, or ethnic background is somehow a racial classification is ridiculous. It is axiomatic that, to be a "racial classification" for purposes of the equal protection clause, the regulation must be *racially discriminatory* in purpose or motive. See generally, Note, "Developments in the Law—Equal Protection," 82 HARV. L. REV. 1065, 1087 *et seq.* (1969).

Perhaps the reason for Petitioner's attempts to fit this case into a context of racial discrimination is explained by the following:

> "|T|he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable. Even so, education does not seem quite so fundamental as rights of criminal defense and voting. *Perhaps for this reason, those educational classifications which have been found to deny equal protection have involved a racial element as well.* . . . Even in cases where the classification proved harmful in fact to Negro educational opportunities, most courts have been reluctant to disturb the decisions of school boards acting without a racially discriminatory motive." *Id.* at 1129 (footnotes omitted).

Petitioner's appeal to the equal protection clause is not surprising. While certainly a vital and important constitutional doctrine, the equal protection clause is, as

Justice Holmes once remarked, "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927). However, the equal protection clause was not engrafted onto the constitution to prevent reasonable differences in regulation between the various academic institutions in our country, when such differences are based upon reasonable distinctions in the situations existing therein. As stated in THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, Senate Document No. 39, 88th Cong., 1st Sess. 1292 (1964 ed.): "Except where discrimination on the basis of race or nationality is shown, few police regulations have been found unconstitutional on this ground [equal protection]."

CONCLUSION.

The decisions of the courts below are in complete accord with the decisions of this Court, are based on a proper view of the administrative problems faced by public school officials in minimizing disruption to the educational process, and have correctly rejected Petitioner's arguments which are based upon a misconception of decisions of this Court and upon obiter dictum and non-comparable fact situations faced by other courts in their decisions.

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1109

THOMAS GUZICK, JR., a minor, by his next friend and father THOMAS GUZICK,

Petitioner,

—v.—

DONALD L. DREBUS, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI

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—v.—

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SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief is being filed pursuant to Rule 24(5) of this Court's Rules.

The petition for certiorari was timely filed on December 15, 1970. The respondents secured an extension of time until February 3, 1971 in which to file a brief in opposition.

Petitioner files this Supplemental Brief to bring to the Court's attention a recent decision of the United States Court of Appeals for the Fifth Circuit which directly conflicts with the decision below as to the proper interpretation of *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). In the petition for certiorari filed in this case, petitioner suggested that the writ be granted because the ruling below was in conflict

with this Court's decision in *Tinker*, thus reflecting general confusion among the lower federal courts concerning the First Amendment rights of public school students.

On January 14, 1971 the United States Court of Appeals for the Fifth Circuit decided *Butts, et al.* v. *Dallas Independent School District*, —— F.2d ——, 39 Law Week 2405 (1/26/71), *revg.* 306 F. Supp. 488 (N.D. Tex. 1969), holding that high school students were entitled to wear black armbands to school to protest the Vietnam war and enjoining the school policy against such insignia.

There are two reasons why the Fifth Circuit's decision is of sufficient importance to bring it to the Court's attention in this manner. First, the *Butts* opinion, in stark contrast to the ruling below, properly applies the various elements of the "substantial disruption" test set forth in *Tinker:* that real disruption, rather than mere annoyance or inconvenience, must occur or be probable; that the disruption must flow from the conduct of those exercising their rights; and that the school officials must meet their burden of proving these elements. Second, the Fifth Circuit, unlike the court below, gave proper application in the public school context to important First Amendment doctrines developed elsewhere.

The *Butts* decision is appended. Its key features follow.

In October 1969 students throughout the Dallas area planned to participate in the nationwide October 15 Moratorium against the Vietnam war. To express their dissent from American policy and their grief at American deaths, the students intended to wear black armbands to school on that day. School officials, resurrecting a so-called "long-standing" "no insignia" rule almost identical to the one

offered below, determined to prevent the wearing of black armbands. Despite those efforts, numerous students came to school with armbands on.

The armbands themselves, like the petitioner's peace button, caused no disturbance. But the general situation was far from calm. Prior to October 15, "disruptive sit-ins" had occurred in nearby schools. A bomb threat was made; a police official warned school officials that trouble was expected. On October 15, students massed across the street from one school. Counter protestors wore white armbands, and one clique donned swastikas. But, as the Fifth Circuit noted, ". . . the schools opened and classes were attended as usual, though perhaps not with full efficiency." App., *infra*, p. 5a.

By comparison to this turbulent tableau, the circumstances flowing from petitioner's wearing his peace button were singularly uneventful. Yet the Sixth Circuit held that the petitioner could be disciplined even though no disruption accompanied his protest. Indeed, the generalized fears that motivated the respondents here—that *other* students would wear other types of buttons which might cause disruption—actually materialized in *Butts*. Nevertheless the Fifth Circuit applied the proper rule, holding that since the plaintiffs *themselves* neither intended to nor did engage in the feared disruptive conduct, their expression was protected. The conflict in these two rulings is glaring and must be resolved by this Court.

In addition to properly applying the substantial disruption rule of *Tinker*, the Fifth Circuit's opinion is highly relevant in two further respects. First, it applies the traditional overbreadth doctrine in the public school context

by holding that certain kinds of insignia cannot *per se* be prohibited merely because other symbols might cause disruption. This was one of the issues tendered to the Court in the certiorari petition. Second, the *Butts* opinion utilizes the hostile audience rule, advanced by petitioner, in rejecting the argument that the plaintiffs' expression could be inhibited because disruption would be caused by those who opposed it. *Accord, Crews* v. *Clones,* 432 F.2d 1259 (7th Cir. 1970).

Finally, the most important reason for granting this petition is to reverse the improperly restrictive view of *Tinker* enunciated below. As the *Butts* opinion concludes:

> Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. App., *infra,* pp. 9a-10a.

Petitioner submits that this is the proper view of the First Amendment rights of public school students, that it directly conflicts with the ruling below and that the conflict should be resolved by this Court.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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February 5, 1971

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29281

RUTH J. BUTTS, *et al.*,

Plaintiffs-Appellants,

—versus—

DALLAS INDEPENDENT SCHOOL DISTRICT and NOLAN ESTES,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(January 14, 1971)

Before:

RIVES and SIMPSON, *Circuit Judges,* and
NICHOLS, *Judge of the Court of Claims.**

NICHOLS, *Judge*: Plaintiffs, minors, brought this action by their next friends in the United States District Court for the Northern District of Texas, and appeal from its final judgment dismissing their complaint. We reverse.

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* Sitting by designation as a member of this panel.

The defendants are the Dallas Independent School District, in whose schools plaintiffs were enrolled, and Dr. Nolan Estes, the Superintendent. The action was said to arise under the Fourteenth Amendment and 42 U. S. C. § 1983, which reads as follows:

* * * * *

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

The alleged wrong was in defendant's refusal to allow plaintiffs to wear black armbands in school on October 15, 1969, and their anticipated continued refusal on later dates. Plaintiffs sought an injunction, a declaratory judgment, and nominal damages of $1.00. The District Judge conducted a hearing and took testimony on a prayer for a temporary injunction, but by stipulation the parties agreed that the hearing and his opinion should be "disposition on merits."

Defendants urge that the School District is immune from suit under § 1983, but this circuit has recently held that such immunity exists only with respect to money damages and not as to equitable relief. *Hankins* v. *Sweeney Independent School District*, 427 F. 2d 319 (5th Cir. 1970). *See* also *Maghee* v. *City of Plantation, Florida*, 375 F. 2d 447-451 (5th Cir. 1967). We treat the claim for $1.00 damages as waived. No evidence was offered to show pecuniary injury in any amount.

Defendants also say that plaintiffs do not belong to the class protected by § 1983 because the alleged wrong was not inflicted because of race. The absence of a racial question has been ignored in many cases under § 1983, *e.g.*, *Tinker v. Des Moines Community School District*, 393 U. S. 503 (1969); *Trister v. University of Mississippi*, 420 F. 2d 499 (5th Cir. 1969), and is expressly rejected by this circuit in construing the closely related criminal provisions of 18 U. S. C. § 242. *Miller v. United States*, 404 F. 2d 611, 612 (5th Cir. 1968).

Plaintiffs wish to secure a declaratory judgment condemning part of a regulation of the School Board as unconstitutionally vague and overbroad. Identified as Regulation 5133 (1) (a) (10), it reads as follows:

> (10) Wearing at school any special garb, haircuts, or unusually distracting insignia designed to distinguish members in an excessive way from other students.

The Regulation as a whole is written to implement a Texas statute which undertakes to drive "social clubs," *i.e.*, fraternities, sororities and secret societies from the public schools. It defines certain acts the Board believes to be prohibited, among others those in the paragraph above quoted. The "members" are obviously members of social clubs. The record here reflects that the plaintiffs wished to wear black armbands to show their opposition to United States involvement in the Vietnam hostilities. An organization based in Washington called the National Moratorium Committee had suggested that they do this, and in a loose way they were its supporters, but there is nothing to show it had members in the ordinary sense, as a social club does. In any event, its purposes were political, not social. A separate section of Regulation 5133, not attacked, deals with participation of students in political organiza-

tions. Both sides in this litigation, for different purposes of their own, no doubt, seem to agree that paragraph 10 has something to do with this case. Nevertheless, it is an effort to deal with issues wholly distinct from those involved here, and we think it would be improper for us to make any pronouncement upon it. We are not bound by counsels' interpretation of this document. *Pitcairn* v. *American Refrigerator Transit Co.*, 101 F. 2d 929 (8th Cir.), *cert. denied*, 308 U. S. 566 (1939).

The underbrush cleared away, the main issue of the case emerges. The Supreme Court held in *Tinker* v. *Des Moines Community School District*, *supra*, at 505, that wearing black armbands in school to protest the Vietnam involvement was "closely akin to pure speech" protected by the First Amendment and could not be prohibited when it did not cause disruption of school discipline or decorum. The Court refers with apparent approval to companion cases in this court: *Burnside* v. *Byars*, 363 F. 2d 744 (1966); and *Blackwell* v. *Issaquena County Board of Education*, 363 F. 2d 749 (1966). Both involved prohibition against wearing SNCC buttons, by the school authorities. In *Burnside* there was no disruption and the authorities were enjoined. In *Blackwell* there was (in the form of button-wearing students trying to force buttons on the others) and the complaint was dismissed. The duty of the courts in future cases of the same kind therefore seems clear enough, and the trial judge properly proceeded to examine in detail the alleged disruptions and threats of disruption that were considered by the Dallas School Officials on and just before October 15, 1969. To this we now turn.

The Vietnam moratorium of October 15, 1969, may end up as a footnote to history but it was tremendous in

anticipation. The focal event was to be a mass peaceful demonstration of young people, about the White House in Washington, D. C., but the sponsors issued a manifesto to high school children elsewhere, among others, calling on them to boycott their classes that day, or attend them wearing black armbands as symbols of protest. Someone published a local mimeographed flyer to the same effect. These found their way into the hands of the defendants' school authorities, who concluded that October 15 probably would be a day of disruption in their schools. A former pupil of the District, not directly connected with the Committee or its supporters, threatened to bomb one of the defendants' schools. As the day approached, disruptive sit-ins did occur in the schools of a nearby community, not under defendants' jurisdiction. The organizers of this effort failed, however, to influence defendants' pupils.

The morning of October 15, a Dallas police officer called on school officials to advise that his department expected trouble and to offer what help he could. A group of students massed across the street from one of the schools displaying a large banner reading "Try Peace." A youth of contrary mind snatched this banner and ran away with it. Apparently, however, the schools opened and classes were attended as usual, though perhaps not with full efficiency.

Not all students supported the protest. Besides the one mentioned above, others wore white armbands. None of them testified nor were any manifestos offered, which were attributed to them, and their precise position thus is not in the record, except that they opposed what the black armbands favored. There was also a clique who evidently went further, revering the memory of Adolf Hitler and seeking to establish (or re-establish) white supremacy in

this country. One of these soon after October 15, appeared at school wearing a large "swastika" necklace and a like symbol emblazoned on his jacket. He was, of course, speedily removed from the scene.

On learning of the plan to wear black armbands in school, Dr. Estes decided, as he testified, that it was disruptive and contrary to long standing school policy. In support of the long standing of this policy, however, he proffered Regulation 5133, which, as indicated above, fails to show it. The trial court's finding as to the long standing of the policy appears to lack support of substantial evidence. If it makes any difference, it would seem the policy was improvised ad hoc for the occasion. Other "peace symbols" until then had adorned the garments of students without evoking any administration concern. Indication that the policy was new appears also in the fact that the principals of some individual schools were slow in getting the word, with the result that in their schools black armbands were in fact worn for several hours, in one school all day. As the principals and assistant principals learned of the policy, they intercepted wearers of black armbands in the halls and corridors, or called them out of class, requiring them to choose between removing the armbands or going home, being then charged with unexcused absence. The plaintiffs all refused to remove their armbands and left school for the remainder of the day. Many other students took off their armbands. Dr. Estes intended the elimination of the white armbands also, but the record fails to indicate that this was generally achieved, another indication of hasty staff work.

It is undisputed that there occurred in fact no substantial disruption on October 15, 1969, in defendants' schools, either before or after the removal of the black

armband wearers. There was also no disruption that day in schools outside defendants' jurisdiction, but in the same general area of Texas, for example in the nearby city of Fort Worth, where the black armbands were tolerated throughout.

None of the school officials who testified expected the wearers of the black armbands to initiate disruption. Rather they believed that the black armbands incensed students not participating in the protest because they gave a false impression of the attitudes general in the schools. The question of public image was important because the media with TV cameras were present at the scene. It was feared that white armband wearers would tear the black armbands off the arms of those who wore them. To dissuade this, school officials urged white armband wearers to restrain themselves, saying that this was an administration matter and administration would take the necessary action. There is no mention of any perceived necessity to urge restraint on black armband wearers.

Nevertheless, counsel for defendants have urged, and still do, that by wearing black armbands plaintiffs and others proclaimed their adherence to the entire program of the Moratorium Committee including its proposals for interruption of school work. Hence, it is said, school officials could use the black armbands to identify the potential disrupters and had a duty to stop them before they could carry out any of their program. This ignores the manifestos referred to above. Exhibit 1 clearly proposes the black armbands as "either - or" alternatives to other measures. Counsel abandons the testimony of defendants' own witnesses as to how the disruption was expected to commence. And he calls on us to subscribe to a kind of "guilt by association" (*Elfbrandt* v. *Russell*, 384 U. S. 11,

19 (1966), and cases cited therein), particularly obnoxious in the case of an organization like the Moratorium Committee, having so far as appears, no clearly defined membership. Whatever the black armbands may have communicated, the record is devoid of any evidence that it did in fact communicate to any witness an intention on plaintiffs' part to engage personally in the feared disruptive actions.

We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred. Likewise, we agree that, antecedently considered, as they had a right and duty to consider the problem, disruption on October 15, 1969, was proved to be a likely contingency. We do not agree that this expectation sufficed *per se* to justify suspending the exercise of what we are taught by *Tinker* is a constitutional right. What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.

The boy who came to school flaunting his Nazi symbols was also, of course, communicating his ideas in his own fashion. However, the black armbands were more adult, more rational adornments. The use of the ancient symbol of mourning as a propagandistic device is clever precisely for the reason that it should put others differently minded on their best behavior. After all over 44,000 Americans have died in Vietnam and all of us must mourn them. We differ only in what we think the President and Congress ought to do to end the bloodshed. The difference between merely unwise or unpopular language and "fighting words" is well recognized in First Amendment cases. *Compare*,

Terminiello v. *Chicago*, 337 U. S. 1, 4 (1949), and *Edwards* v. *South Carolina*, 372 U. S. 229, 236 (1963), with *Feiner* v. *New York*, 340 U. S. 315 (1951). What seems clear is that black armbands are not *per se* akin to "fighting words," just because armbands of other colors, or shirts, or hats, have sometimes been so. Therefore, even in the school environment, where no doubt restraints are necessary that the First Amendment would not tolerate on the street, something more is required to establish that they would cause "disruption" than the *ex cathedra* pronouncement of the superintendent.

There is nothing in the instant record to show, e.g., conferences with leaders of the student factions, which might have developed solid information as to their attitudes and intentions. The school system had programs in which students were encouraged to speak out about current issues including Vietnam, in order to develop them as national leaders of the future, but no use apparently was made of this machinery to bring leaders of the white armband faction together with the black armbands to agree on mutual respect for each other's constitutional rights. If this had been tried and failed, the failure would have tended to establish that armbands of all colors should be banned. In short, it appears to us that the school system was confronted with a rapidly developing crisis, for which it had no policy predetermined, and instead of obtaining an answer through democratic processes, it responded with a hasty ukase.

Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a con-

stitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination.

So far as the record shows, the plaintiffs would still like to wear black armbands to school and defendants would prevent their doing so. If these conflicting resolves have in any way moderated, the record does not so disclose, and mootness is not suggested. Therefore, plaintiffs are entitled to the injunction they request.

The complaint alleged that their exclusion from classes caused them to miss instruction they would otherwise have received. Except for one young man who was excluded from IBM work for the remainder of the term, the amount of teaching that was missed was slight and no doubt was soon made up. The IBM work was not a credit course. If, however, any makeup work is required to put any plaintiff where he would have been as to school advancement if not excluded because of his black armband, the District Judge can provide for the situation in framing the injunction.

The order entered by the District Court denying the injunction sought is hereby vacated, the judgment is reversed and the cause is remanded with direction to the District Court to grant an injunction enjoining defendants from interfering with plaintiffs in the exercise of their First Amendment right by wearing black armbands to school to protest the Vietnam war.

REVERSED AND REMANDED.